TILBURG UNIVERSITY

Tilburg University

Fundamental rights & environmental justice

Kuchta, S.A.

Publication date:
2010

Document Version
Publisher's PDF, also known as Version of record

Link to publication in Tilburg University Research Portal

Citation for published version (APA):
Kuchta, S. A. (2010). *Fundamental rights & environmental justice: Identifying rights-based environmental protection in Europe and the United States*. [Doctoral Thesis, Tilburg University]. [s.n.].

General rights
Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

Take down policy
If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Download date: 05. May. 2023

Fundamental Rights & Environmental Justice:

Identifying Rights-Based Environmental Protection in Europe and the United States

Fundamentale Rechten en Milieugerechtigheid

Proefschrift

ter verkrijging van de graad van doctor aan de Universiteit van Tilburg op gezag van de rector magnificus, prof. dr. Ph. Eijlander, in het openbaar te verdedigen ten overstaan van een door het college voor promoties aangewezen commissie in de aula van de Universiteit op dinsdag 14 december 2010 om 16.15 uur

door

Stephen A. Kuchta

geboren op 16 januari 1980 te Derby, Verenigde Staten

Promotiecommissie

Promotor:	Prof. mr. Jonathan Verschuuren
Overige leden:	Prof. Richard S. Kay
	Prof. mr. Willem van Genugten
	Prof. dr. Aart de Zeeuw
	dr. Hanneke Kruize
	dr. Rianne Letschert

Thanks and Acknowledgements

Thank you to everyone who showed me that home is where ever you have friends.

My home grew tremendously during the writing of this thesis as major parts were composed in

- Tilburg, Noord-Brabant, The Netherlands, at Tilburg University
- Storrs, Connecticut, USA, at the University of Connecticut
- South Royalton, Vermont, USA, at Vermont Law School
- Mannheim, Baden-Württemberg, Germany, at the Universität Mannheim
- Rochester, New York, USA
- Toronto, Ontario, Canada
- Long Lake, Adirondack Park, USA
- . . . and on various forms of transportation there between

Thanks go out to all the institutions, in addition to the people, who made visiting and traveling possible.

On a personal level, tremendous thanks go out to Rob & Suzan, Nicole, Fanny, Felix, Malini, Lorena, Ignacio, Maarten, Renske, Karljin, Pieter, and John. Tilburg wouldn't have been "mijn thuis" without you. To Eric, Vielen Dank for keeping me sane and for pulling me out of the office. To Rob, Robbie, and Ben, bedankt for the many adventures. There's more than a little bit of the Wilsons, the Jurgilases, and the Fitzgeralds in here too, not to mention Erin; you all kept me going in the toughest times. Finally, to my promoter, Jonathan Verschuuren, for all the advice and gentle guidance that brought this work to fruition and to Rianne and all of INTERVICT's senior staff for trusting and supporting me in the many trials and travels.

The original manuscript was typeset using LaTeX and open source editing and bibliographic software.

To my parents

Foreward

If the breadth of this work accomplished anything, it was because of the freedom afforded by its funding. Much research does not allow such unfettered exploration. That is especially the case with environmental research. As of the late 1990s, environmental research in the Netherlands was largely contract research. Environmental research projects drew funding in the form of contract research 50-70% of the time, while the average across Dutch universities was 25-30%.[1] The outcome was policy-oriented works aimed at immediate application. Theoretical treatments on larger issues, including the interaction of social, economic, and environmental spheres, which this work tackles as environmental justice, saw little attention.

The research before you is some evidence that those times have changed. Nevertheless, it bears noting that had the project and generous funding it received been even moderately steered from the outset by a desire to create, evaluate, and recommend a future-focused policy—Dutch or otherwise—the path would have been tremendously different. This is certainly not to imply that that outcome would have been in any way worse. It would be impossible in any event to compare. If the outcome here, however, contributes both to the environmental justice discussion and to the broader social and political perspectives on environmental issues from which it draws, then future research should make sure to make room for larger theoretical works within their policy-minded funding.

There is an obligation that goes along with that too: to make sure to provide sufficient training for researchers in all the fields that now so clearly come to bear the "Green Discussion." If there is one thing that studying environmental justice has taught it is that no longer can researchers be only an environmental lawyer, or an environmental economist, a student of social justice, or even human rights advocate; one must now be all of those.

I doubt that the work at hand demonstrates that I personally have reached that level of professional development in all those subject areas. If this is a shortcoming of the work then it is one I admit with some pride. It was a conscious decision taken early in the research not to "sharpen our gaze by narrowing the focus." With a mandate to examine the environmental justice

[1] Leroy, Pieter/Nelissen, Nico *Social and Political Sciences of the Environment: Three decades of research in the Netherlands.* International Books, 1999, p. 21.

discourse in the U.S. and in Europe it became obvious during the course of research that making tight comparisons would necessarily blind the reader to the wider issues which were revealed when comparing the twin discourses more broadly. Given that nearly all researchers come at environmental justice as a side project, lead into the area by their main interests and predominant academic discipline, there was both an opportunity and a need to start in the middle for a change. In places, that may have necessitated a more cursorary treatment of a topic than a specialist may have liked. Nevertheless, it is the hope that this work identifies those areas clearly for such specialists who would rather focus narrowly and do not have the ability in their current academic or professional situation to read broadly.

At the expense of empirical conclusions or doctrinal recommendations this work stands foremost as an introduction to environmental justice standing abreast two very different continents. Similarities in living standards and culture aside, the historical momenta of each have played tremendous roles in shaping their legal landscapes and therethrough the picture of environmental justice which they present. If environmental justice is indeed more than a green-tint on social justice, or likewise the literal dirt left by the yet-unfinished project against racial discrimination, then it needs to focus on and explain more than its own immediate surroundings. Hopefully this is a helpful step toward those explanations.

Contents

1 Prologue

> Injustice, then, is simply inequalities that are not to the benefit of all. Of course, this conception is extremely vague and requires interpretation.
>
> *John Rawls*

1.1 Motivating the Discussion

There have been twenty-two pieces of legislation proposed in the United States Congress which attempted to codify environmental justice standards.[1] All have died in Committee negotiations. After two decades of discussing environmental justice—in the sense of the term that the pieces of legislation utilize—no substantive U.S. federal law exists and none are on the horizon. That is, there is no additional regulation on nor prohibition about clustering environmental burdens, even when those clusters are centered around minorities, or poor or at-risk.

The high-water mark for the environmental justice movement in the United States as far as legislation was the procedurally-focused and much cited Executive Order 12898. The Executive Order is, however, a federal policy in word alone, knighting environmental justice as a nobel cause but granting it no sword or armour.[2] This outcome has a visceral connection with the state of

[1] Including but not limited to: agreeing on a H.R. 2105, 103d Cong., 1st Sess (1993), (The Environmental Justice Act of 1992); H.R. 1924, 103d Cong., 1st Sess. (1993), (The Environmental Equal Rights Act of 1993); and S. 1841, 103d Cong., 2d Sess (1994), (the Public Health Equity Act); cf. Lambert, Thomas/Boerner, Christopher Environmental Inequity: Economic Causes, Economic Solutions. *Yale Journal on Regulation*, 14 1997 and Jaffe, Seth D. The Market's Response to Environmental Inequity: We have the solution; what's the problem? *Virginia Environmental Law Journal*, 14 1995.

[2] See Section 5.4.4. The Council on Environmental Quality (CEQ), who oversees the U.S.'s compliance with its environmental obligations and therefore has guidance over the

the environmental movement in general; there are achievements in recognizing much about the way modernity manages the environment but very limited motion in changing the management. More specifically, efforts for environmental justice to borrow existing policy weapons from both the environmental movement proper and from the powerful civil rights movement brought demonstrably little success,[3] failing in a broad way to ignite the problems of *clustered* pollution into a firestorm of legislative reforms the way that the more general problems of pollution swept like a wildfire over the legal landscape. Among the reasons for the failure is the stinging criticism that there is little hope in crafting effective policy though when we have "little empirical verification of the true extent of the problem."[4] The intervening decade has unfortunately not reduced the truth of that statement or delivered new requisite empirical data.[5]

And all of this in the country where the environmental justice movement got its start. What should one conclude from the fact the the environmental justice discussion failed equally to reach critical mass in Europe, although it did sprout and leave new tangential roots? With such an ostensibly negative outlook, why should one read—or write, for that matter—a(nother) book espousing legal opinions and options toward addressing environmental justice? That is to ask, why are we—economists, lawyers, sociologists, political scientists and more—still talking about what it means to be environmentally just?

The simplest answer is that despite the external notes of pessimism the internal academic milieu remains quite comfortable. That comfort seemingly derives from the multitude of paths toward environmental justice still to explore, paths that each academic field opened for discussants over the past decades of trial-and-error on several continents. Identifying the problems has been the easy part; many of these academic paths widen the definition of environmental justice, moving away from racial bias as the gravity in clustered

Executive Order, issued guidelines after the Order's issuance specifically stating that the order "does not change the prevailing legal thresholds and statutory interpretations under [the National Environmental Policy Act] and existing case law." See Council on Environmental Quality (CEQ) *Environmental Justice Guidance under the National Environmental Policy Act*. Washington, D.C., 1997 – Technical report

[3]See Chapter 5. In general also Davy, Benjamin *Essential Justice: When Legal Institutions Cannot Resolve Environmental and Land Use Disputes*. Springer, 1997

[4]Cutter, Susan L. Issues in Environmental Justice Research. *Proceedings, Third National Conference on GIS and Public Health*, 3 1999, p. 525; See discussions of empirical problems in Chapter 3.

[5]In fact, there is likely more that environmental justice research does not know now. See Section 3.4.

environmental burdens and rather connecting the outcomes the dynamics of inequality in modernity. In doing so they greatly expand the scope of investigation.[6] Parts of the widened scope harken back toward the very early social justice roots of environmental justice,[7] while others stay closer to the advocacy core, but dig deeper in bringing more objective tools to bear.[8] And although many more hurdles than practicable solutions have been identified the majority of proposed paths have yet to be ruled dead ends. There is work here to be done.

Given the many routes currently under investigation, how does one choose to focus on one? More specifically, how can this work from the outset choose to focus on a human rights approach? This work grounds its choice to come at the problem from a certain direction in the underlying disfunction of environmental injustice–the disheartening expectations for a minority of the population burdened with relatively more environmental problems. Even if their numbers are not yet impacted by a specific environmental threat, the well-known ability of environmental burdens to move leaves them expecting to be in the path of motion of burdens with their numerical disadvantage, along with any concomitant socio-economic disadvantages. That is, this research first explains why environmental justice is a concern of human rights proportions before searching for human rights answers.[9] But for the broader community of legal

[6]Notably a special issue of Antipode (2009), discussing specifically the widening views in sociology of the spaces of environmental justice, viewing more than just geographic distributions. See Holifield, Ryan/Porter, Michael/Walker, Gordon Introduction: Spaces of Environmental Justice: Frameworks for Critical Engagement. *Antipode*, 41 2009, Nr. 4.

[7]Notably, Wenz, Peter S. *Environmental Justice*. SUNY Press, 1988. Also note early German literature on pollution and unequal impact of effects: Jarre, Jan *Umweltbelastungen und ihre Verteilung auf soziale Schichten*. Otto Schwarz & Co, 1975; Zimmermann, Klaus *Umweltpolitik und Verteilung: eine Analyse der Verteilungswirkungen des öffentlichen Gutes Umwelt*. E. Schmidt, 1985. Also from legal research see Gormley, W. Paul *Human Rights and Environment: The Need for International Co-operation*. A.W. Sijthoff, 1976, and from economics Baumol, William J/Oates, Wallace E *The Theory of Enviromental Policy*. Cambridge University Press, 1998 esp. p. 240-256.

[8]Inter alia, in the U.S. Bowen, William M/Atlas, Mark/Lee, Sugie Industrial Agglomeration and the Regional Scientific Explanation of Perceived Environmental Injustice. *Annals of Regional Science*, 43 December 2008, Nr. 4; Noonan, Douglas S. Evidence of Environmental Justice: A Critical Perspective on the Practice of EJ Research and Lessons for Policy Design. *Social Science Quarterly*, 89 2008; Cutter, Susan *Hazards, Vulnerability, and Environmental Justice*. Earthscan, 2006;Bowen, William M *Environmental Justice through research-based decision making*. Garland Publishing Taylor & Francis Group, 2001; in Europe, especially the social health dynamic, Elvers, Horst-Dietrich/Gross, Matthias/Heinrichs, Harald The Diversity of Environmental Justice: Towards a European Approach. *European Societies*, 10 2008; Bolte, Gabriele/Mielck, Andreas *Umweltgerechtigkeit. Die soziale Verteilung von Umweltbelastungen*. Juventa, 2004.

[9]Chapter 2.

scholars and environmentally-inclined researchers who take issue with human rights approaches, this book still has something to offer by touching on and summarizing a wealth of literature in and surrounding environmental justice while making its case for a rights-based solution. This is a auxiliary outcome stemming from the project's mandate to investigate environmental justice from the inside outward in both the U.S. and in Europe.

The parallel literature evaluation carries the main methodological goal as it moves through the established environmental justice canon. By discussing at length the shortcomings of the more established and more examined routes towards environmental justice while keeping in mind the expectation of some degree of relative political and legal weakness on the part of the groups concerned about injustice, the research exposes that a rights-based approach is both more comprehensive of the generating phenomena of injustices and a more coherent tact for environmental justice realization, laying as it does within relatively well-tested boundaries of law.[10] Whether or not a researcher agrees fully with this conclusion, this thesis still provides a taking off point for their own work. To that end, extensive references toward priming a counter literature review are provided.

Also important is that the multitude of paths toward environmental justice, paths which travel over many scenarios which would decrease *disproportionate environmental burdens*[11] have come into view as researches have pulled upward and outward from the tight zoom on the U.S.-centered environmental justice movement. This work continues this trend by straddling the conversation in Europe and the U.S. As researchers pull the focus back, however, there is some natural sacrifice in resolution power as well as in directed academic momentum. That is not to say that the wide-angle has stopped case studies and smaller scale, policy-focused investigations.[12] Nevertheless, the

[10] See Chapter 4.

[11] Noting early the criticism that "disproportionate" needs a comparator group, something that most environmental justice studies never state explicitly. Noonan.

[12] Recent dissertations provide an excellent example of this, including: Oemrawsingh, Sangini Tilottama *Human Rights and the Environment Interlocked: Dealing with Environmental Problems in a Human Rights Setting.* Ph. D thesis, Universiteit van Amsterdam, 2008; Kruize, Hanneke *On environmental equity: exploring the distribution of environmental quality among socio-economic categories in the Netherlands.* Ph. D thesis, Universiteit Utrecht, 2007; Fraser, Leah Marie *Participation and policy: A case study of environmental justice government-social movement interaction.* Ph. D thesis, University of California, Irvine, 2005; Ottigner, Gwen Ellen *Grounds for action: Community and science in environmental justice controversy.* Ph. D thesis, University of California, Berkeley, 2005; O'Neil, Sandra George *Environmental Justice in the superfund clean-up process.* Ph. D the-

loss in general resolving power of a wide-angle view has largely stymied the progression of academic musings toward general practicable applications. It is therefore important that this work do more than summarize where environmental justice has been and catalogue the various paths which are open to forward motion; it concludes on a theoretically practicable application. The be fair, however, the scope of the work falls short of a discussion on moving toward that implementation. Agreement with the conclusions herein on the desirability of a human-rights approach necessitates an immediate follow-up discussion on the institutional ramifications of such a change, migrating as it does pieces of current regulatory frameworks and environmental oversights toward the human rights institutions. The practical component is left for future, but immediate, work.

To summarize then the primary mission of the work is to defend to the reader the application of fundamental rights—human, constitutional and civil—in an environmental direction as a practical, established, and cohesive approach to protecting against the realities of environmental injustice. The application is based on a comparison of the outcomes of the different ways in which Europe and America have utilized—and blocked—their existing rights-protections in environmental directions and their ability to prevent the shifting of environmental burdens toward a minority of society. Hopefully, the arguments here will both serve as roadmap and pave a certain road toward future human rights approaches to environmental justice protection.

1.2 Hypothesis and Methodology

This thesis tests the hypothesis that the problems fomenting themselves as environmental injustices can more completely solved by operationalizing existing rights toward environmental ends. The concept of extending protections from extant rights into green areas is known broadly as a derived environmental human right (derived-EHR). To support the hypothesis, the research takes the following methodology. First, the hypothesis itself is derived from a wide reading of the literature revealing the democratic and economic dynam-

sis, Boston College, 2005;Schweitzer, Lisa *Environmental Sacrifice Zones: Risk and Transport in Southern California*. Ph. D thesis, University of California, Los Angeles, 2004. On drawbacks to constant focus on policy-oriented environmental studies, see Leroy, Pieter/ Nelissen, Nico *Social and Political Sciences of the Environment: Three decades of research in the Netherlands*. International Books, 1999.

ics which foment the problem now known as environmental justice (Chapters 2,3). Simply positing a human right to solve a problem is an overuse of the rights discourse; the problem must exist in the realm of problems traditionally addressed by the liberal rights canons. The investigation of environmental justice though shows that one should *expect* disproportionate distributions of burdens, or at a minimum a degree of clustering, and that they are more likely to affect a minority of the population, including the traditional areas focused on by environmental justice research like lower income and racial minority populations. That established, the injustice problem reaches to the level of a human rights issue because the numerical and power insufficiencies of the affected groups will necessarily make the situations difficult to address politically and/or legally.

The ubiquity of the environmental injustice problem, both theoretically and in practice, is illustrated here by the literature of the movement itself,[13] serving both as a bridge to helpful economic theory which quantify the injustice and as the background necessary for the comparisons between the U.S. and European.[14] The background also introduces the forms some attempts at addressing environmental justice have taken, all of which have had less success than the ubiquity of the problem should garner. The European approach, however, has done noticeably better in addressing the underlying mechanics of the injustice problem by emphasizing existing individual rights. It is in fact these established, protected areas which are impacted by the tilting of environmental burdens toward smaller and less powerful groups.[15] As it is the ubiquity of the problem which raises environmental injustice to the level of rights-based analysis there remains in the wake of the past experience little reason to believe that non-rights-based methods could be a more ready solution or a more complete attack on the foundation of the problem.[16] Therefore the environmental justice problem is shown to be both an issue calling on and impacting fundamental rights and only ineffectively and inefficiently soluble by non-rights methods.

[13] Chapter 3.

[14] For the interested reader, the outcomes from this approach finds strong parallel support in the extensive theoretical derivations of Davy. Davy, Benjamin *Essential Justice: When Legal Institutions Cannot Resolve Environmental and Land Use Disputes*. Springer, 1997.

[15] Chapters 4 and 5.

[16] Such is only strengthened when viewed in full on top of the regulatory state. As this research does not dig deeply into the interplay of individual state's regulations it leaves the hypothesis in its stronger form.

This is supported by showing how many the benefits identified in the EHR literature and illustrated by the actual jurisprudence of the European Court of Human Rights (ECtHR) succeed in addressing environmental justice concerns. Instead of predicating a new substantive right to the environment on some objective measurement of quality, such as on an acceptable magnitude of risk or exposure or on even more vague notions such as "satisfactory" environment, the European derived-rights approach simply but actively recognizes the myriad ways in which environmental quality impacts the established liberal canon of rights. This is only the lower bound; the jurisprudence bringing environmental concerns into a nexus with more positive, second-generation, rights pushes protections closer to realization of an EHR and by extension does more to protect the disempowered individual from environmental injustices.[17] Even without further elaboration, however, the derived-rights so far illustrated encompass more of the generating problems of environmental justice than any other approach. This statement finds much support in a comparison to a similar U.S. approach, from which the concept of environmental justice emerged, but which focuses narrowly on anti-discrimination protection instead of the multi-axial rights overseen by the ECtHR.

Notably, as this is a first attempt at working the mechanics of derived EHR rights into protecting against environmental injustice this work does not attempt to hold the conclusion up as the best solution, nor will one find an attempted proof that this is *the* solution to the myriad problems and circumstances identified in decades of environmental justice literature. In fact, derived-EHR protections clearly do not go as far as environmental rights advocates would like, otherwise there would be no discussion on taking the next step from derived to codified environmental rights. By extension, derived-EHR protections then also do not provide as much armour as some environmental justice proponents would desire. It nevertheless addresses the democratic and economic problems underlying individual instances in a way which regulation and policy cannot, thus making the fundamental rights approach both more complete and more operational.

In summary, the thesis capitalizes on theory and evidence that the environmental justice problem is larger than applied policy or faulty environmental regulation and therefore moves research to question whether the beneficial

[17]The sociologist might recognize traces of intersectionality discourse here. It is not addressed as such herein but merits noting the implicit parallels.

outcomes in Europe with deriving environmental protections could aid in the solution of environmental injustice problems in general.

1.3 Rationale

The investigation dictates that the research to proceed differently than other environmental justice-centric works. At the level of analysis dictated by the desire to have a broad comparison between very different regions one need not establish the absolute magnitude of the problem, or the size of the environmental *injustice* to see the potential for a problem for democratic society. Thus, there is no empirical case study backbone here but rather a theoretical development. The first investigations (Chapter 2) establish the problem that an environmental offense which falls on a minority of the populace will be a problem for democratic participation and rights protection in general. This chapter also addresses why engaging other aspects of established protection, like attachments to health impacts, will not be expected to supplement a lack of environmental protection. The second investigation (Chapter 3) culls the economic literature to ground the first chapter's illustrations on well-established economic foundations which clearly illustrate the motions of environmental distribution patterns. The failure of other existing attempts to protect against injustices which form the corpus of environmental justice literature within these two chapters accomplishes then the first research goal of raising the environmental justice problem to the level of a failure to protect basic rights.

With that in hand, common sense would steer policy makers toward established levers of control not already deemed problematic or incomplete. When dealing with a problem of this scope, control falls generally into two categories: control from above and control from below. The search starts here with control from above, utilizing the environmental human rights literature as an illustration of the "trump" card function. The search could just as easily start from below but beginning here allows for an introduction and treatment human rights-based environmental control in general (Chapter 4) and its function in Europe in particular. This construction seems more readable than a journalistic catalogue of the various examples of regulation of environmental distributions in all countries which have garnered attention as the concept of environmental justice spread.

The benefits of the broad human rights approach in Europe becomes clearer when one picks up the experience in the US (Chapter 5). Thanks to over two decades of experience in the United States, there is substantial material for a comparison to be made and the lackluster results of attempts to utilize a single fundamental right toward environmental protection stand in stark contrast to the experience in Europe. While the experience is not particularly heartening for an advocate of environmental justice in the U.S. it does serve an important structural role in the development of an environmental justice-inclined rights discourse. The revelation is that there is a surfeit of flexibility to extend existing laws and protections into relevant areas.

The methods followed suggest at a minimum that one cannot expect a renewed or empowered version of environmental regulations or anti-discrimination laws to eradicate the problems of environmental injustice. The problems simply run too deeply for any one method to fix. Flexibility and an individual approach are both hallmarks of the European Court's derived environmental protections and they come to the forefront in this analysis as well. They function where other methods would be too rigid. This negative expectation for other methods finds background support both from the theory-based democratic and economic discussion and from the evidence contained in the experience in the United States. And while the analysis here is certainly not conclusive that similar methods *could not* rectify injustices, it does present major hurdles which would have to be individually surmounted.

Finally, while there are several works, jointly and severally, which catalog the environmental justice literature, none do so with such an explicit focus on operationalizing existing rights for environmental justice ends. Hopefully the detail here will aid in the process of critiquing the hypothesis. Given the flexible state of environmental justice research, criticisms either strengthening the hypothesis or, perhaps, steering environmental rights research down a separate path are both welcome. Conclusions thereto will naturally be the discussion in the last chapter (Chapter 6).

In the final analysis, the efficacy of the derived protection is less important at this juncture than the simple fact that analyzing it forces research to first move upward and outward from the problem of environmental justice as it is currently tackled in any single field. The effort establishes a new vantage point that is useful for later researchers and their own specific proposals (or counter-proposals) and is therefore of value in itself given the current

state of environmental justice research. The specific conclusions in Chapter 6, while being first and foremost in the eyes of a specialist, take a backseat to both the generalist and the newcomer to environmental justice research. In pursuit of supporting its hypothesis the general discussion creates a useful overview for new research and hopefully generates some momentum in those directions. The conclusions move further away from the U.S.-centered model and discrimination-centered perspectives and toward a broader view of the fundamental rights which are impacted by the distribution of environmental burdens. When that is the case, one can see that environmental justice is a problem unlikely to be addressed or solved by policies other than rights-based mechanisms.

2 Introduction

> Even well-functioning markets should not be identified with freedom itself
>
> *Cass R. Sunstein*

While the above sets out the motivation for pursuing this topic in general, as well as the structure adopted to do so, it remains imperative at the outset to set up a rationale as to why one could conceivably choose a human rights path for environmental justice research. Given the emotional significance of any justice issue, an emotion carried in even the briefest of introductions to the environmental justice literature, one might worry that the choice to pursue relief via rights aligns itself with a heavy moral significance. The reach for rights has done so in the past and has at times capitalized on unwarranted *a priori* acceptance.

A *carte blanche* search at a university library for "environmental justice" immediately reveals legal, sociological, economic takes on the theme. Why not attack—or continue attacking—the environmental justice problems via these routes? This introductory chapter sets out the general rationale and motivation on moving toward human rights.[1] The environmental justice research already accomplished, though lacking in many respects, reveals much about the nature and prevalence of environmental justice-type issues. There is much there to capitalize on and to re-position as a stepping stone towards the human rights approach.

Most if not all of the current thinking on environmental injustice rests under the social justice umbrella. Social justice is naturally a broad term though. As no just society arguably exists, social justice research strives for a theory of social activity which is coherently just. And as humans require resources from

[1] It does not, however, discuss the problems or costs of moving from the current systems toward a rights-based system. It treats the two as already-existing structures. Research on the transition though is quite necessary.

and interact strongly with the natural environment a principle on how such interaction can justly and equitably take place is a necessary part of the social justice. That is all a large undertaking, requiring not only a definition of *justice* but defining the coherence and dynamics of the system whose equilibrium said justice even before one turns to the environmental interactions.[2] The idea of engineering a just society from the inside, via the hands which have already been shaped by the social constructs in which they have evolved to operate is a contentious issue however, pressed most coherently during the last century from the liberal tradition and thinkers in the wake of Hayek.[3] There, protecting personal liberty, private property rights, and certain minimums of enforcement becomes the best society can do for the human project; goals of reforming interaction via projects of law are destined for lackluster results and, when they are pressed for too long, abject failure.

This is the first and most general criticism of attempting an environmental justice project via tailored regulation and economic policy action. While that literature itself is too large to serve as a starting point for this book it serves to illustrate that the project of defining "justice" is not only large and contentious but subject to foundational criticism as to the ability to reform. As Gray[4] notes, "[j]ustice does not speak with one voice." Thus, this research does not search for a theory of justice on which to hang environmental justice's hat. In fact, any summary of the classical liberal tradition serves as a forewarning to those who would engage environmental justice as a(nother) means for defining a single set of values which, when properly enacted, are *the* guiding principles for human flourishing.[5] The human rights tradition however sits at the crossroads of the two major philosophical branches of liberalism and active social science. It could be viewed as part of the minimal legal structure necessary for guaranteeing individual liberty or it could be part of the freedoms given up to live in a coherent society. The details of the system of rights

[2]See Barry, Brian *Why Social Justice Matters*. Polity Press, 2005 for an introduction before heading into specific theories of (politico-legal) justice, i.e. Rawls, John *A Theory of Justice (Original Edition)*. Belknap Press, 2005; Nozick, Robert *Anarchy, State, and Utopia*. Basic Books, 1974, among many others in their wake. *Also compare* Gray, John *Two Faces of Liberalism*. The New Press, 2000.

[3]See, especially Hayek, F.A. *The Constitution of Liberty*. University of Chicago Press, 1978. Also Gray, John *Hayek on Liberty*. Basil Blackwell, 1984, esp. p. 118.

[4]Idem *Two Faces of Liberalism*, p. 7.

[5]For an introduction to Gray's political philosophy, see Ibid.; and constructive critiques thereof in Horton, John/Newey, Glen, editors *The Political Theory of John Gray*. Routledge, 2007.

naturally would determine which of the two branches it tends towards but here at the outset merely allows for one way in which to justify the rapid move toward examining human rights as a path in environmental justice directions without grabbing tightly to any philosophical school.

Instead of wading into that larger discussion this work rather straddles the debate to take as a starting point the idea that justice is the "enterprise of pursuing terms of coexistence among different ways of life" and a "project of reconciling the claims of conflicting values."[6] That is, after all, what environmental justice is all about when striped of any historical and moral trappings: finding a compromise between competing valuations of environmental usage in a system that arguably tends to favour one side of the equation. Whether the feeling of injustice is real of perceived,[7] it has unarguably led to the long-standing dissatisfaction with the system which choses how humans utilize and protect the environment and therefore to continued attempts to reform the legal character of the system, attempts which have met with no lasting success.

And so the umbrella of social justice remains currently where to locate the sub-genre of thoughts on justice loosely referenced by environmental justice.[8] The fact that so many disparate thoughts have been put forward under the umbrella of environmental justice, coming from the larger set of ideas in social justice, leaves some hesitation in dubbing the concept a field. There is as yet no way to be sure that the different flavours of environmental justice might yet break off from their loose association and be absorbed into separate fields.[9] That indeed might be beneficial for the directions some would have the topic go. The reader will have their chance to weigh in on that general debate at

[6] Gray *Two Faces of Liberalism*, p. 33.

[7] For an introduction and analysis of the components of injustice, real and perceived, and the momentum that the current system seems to press into the conversation, see Davy, Benjamin *Essential Justice: When Legal Institutions Cannot Resolve Environmental and Land Use Disputes*. Springer, 1997, esp. Part II., also p. 238.

[8] For a very recent "re"-introduction to the competing genres of thought within environmental justice, tackled via the broadening social justice route, see *Antipode* (2009), vol. 41, no.4 especially Holifield, Ryan/Porter, Michael/Walker, Gordon Introduction: Spaces of Environmental Justice: Frameworks for Critical Engagement. *Antipode*, 41 2009, Nr. 4; Walker, Gordon Beyond Distribution and Proximity: Exploring the Multiple Spatialities of Environmental Justice. *Antipode*, 41 2009, Nr. 4

[9] For discussion see Sze, J/London, J K Environmental Justice at the Crossroads. *Sociology Compass*, 2 2008; Benford, Robert; Pellow, David/Brulle, Robert, editors Chap. The Half-Life of the environmental justice frame: Innovation, diffusion, and stagnation In Power, Justice, and the Environment. Cambridge, 2005. Also, discussing dilution effects of "mainstreaming" environmental justice: McCarthy, D Environmental Justice grantmaking: Elites and activists collaborate to transform philanthropy. *Sociological Inquiry*, 74 2004, Nr. 2

the conclusion of this book.[10]

With that being said, it is permissible to take the next step toward justifying a human-rights analysis of environmental injustice. It is a small step from any point in the social justice narrative towards democratic problems that contribute to the expectation of and continued presence of a perceived disproportionateness of environmental burdens. When one is searching for the means with which to assure a conception of social justice one must, in a democratic society, turn to democratic principles themselves. When a problem by definition affects a minority of the people in that society then there is a large potential for failure of a democracy to take those concerns into account.

2.1 Democratic Problems

Where social justice takes a big bite of the "justice" picture, environmental justice should start with a comparative nibble. Social justice discusses the allotment of goods and services throughout society; focusing on environmental issues allows for a smaller and more defined inquiry. And that smaller piece is strongly impacted by outcomes of modern politics, especially in the western democracies with well-developed regulatory states which are scrutinized herein. Problems perceived in the distribution then likely have as a component a failure of the political process. That is indeed the case with environmental justice.

There are echoes here from Wenz' early advice that "[b]ecause environmental concerns are uniquely global... theories of distributive justice are tested most thoroughly for their comprehensiveness when they are applied to environmental matters."[11] The ubiquity of environmental injustice, even in societies who make extensive use of redistribution policies, points at a unique failure to recognize and address this particular manifestation of a distribution problem.

In not having a solid theory of justice on which to hang their analysis and to use as leverage for achieving outcomes, environmental justice must rely on existing political structures for achieving their ends. The literature has shown only lackluster results here. This is likely due to the incompatible and subjective nature of environmental usage, which plays havoc with any attempts

[10] Other areas where environmental justice might fall include under the heading of international justice, if the momentum continues to be lead by legal scholars. See Ebbesson, Jonas/ Okowa, Phoebe, editors *Environmental Law and Justice in Context*. Cambridge, 2009.

[11] Wenz, Peter S. *Environmental Justice*. SUNY Press, 1988, p. xii.

to overlay environmental situations onto any rule-based system of distributive justice. As Gray notes,

> "[w]hen communities contend for power over scarce resources, they are likely to seek to justify their rival interests by arguments of fairness. Where interests are at odds and political power is at stake, shared principles are likely to yield incompatible judgements of what justice demands."[12]

Where incompatible judgments exist, rule-based definitions of democratic society falter.

Without extant rules competing interests will argue over potential rules, utilizing existing legal and political avenues as a fulcrum, exactly what one sees in the environmental justice arena. But what happens when one of those parties is a minority of society, a grouping which is, at a minimum, numerically inferior and has the distinct possibility of being unable or less-able to compete. In that case, the distribution of environmental quality becomes problematic because one can then expect political structures (Chapter 2) and economic realities (Chapter 3)to *disallow* and/or *disadvantage* a minority in the societal dialogue toward peaceful coexistence.

Minority here need not imply a racial or socio-economic group as it does in most environmental justice work, although in practice it often does. Minority in this sense simply means a numerical minority which in general impacts influence and in particular impacts voting. The remainder of this chapter explore why this numerical minority status is such a problem.

2.1.1 The Ability to Impact

Democracy, to cut to the quick, requires two parts to form a relevant governance structure and therethrough work toward any concept of justice: majority rule and minority rights. While the first portion is generally less contentious, owing to the relatively few ways in which decisions can be agglomerated,[13] the latter has required more iterations in political reasoning. There was early recognition that protections needed to be placed in common rule to stop the

[12] Gray *Two Faces of Liberalism*, p. 7; Note the similar sentiment in Davy, as well as echoes of of Stiglerian public choice theory where rival groups will be locked in a zero-sum game for capture of public goods; in this case, that is the assigned usage of the environment.

[13] Although there is a notable literature with the field of economics on the relations between preference aggregation methods like voting and outcomes.

exploitation of citizens by their own government.[14] More recent attempts at explaining and justifying democracy stem from the need to allow free individuals to express their preferences and allow input into decision making.[15] The individual may lend their voice to a government, but the aggregate dynamic from which the sovereign power rises needs to leave room for the individual dynamic itself, for this is where the capabilities needed to build the sovereign of tomorrow grow. It is this reasoning which has echoes in the kind of formal legal consideration, and notably at the highest levels of human rights law, which plays a central role in the coming chapters.[16] Democratic participation is necessary for authentic governance and situations where information held by a minority in the participating populace cannot be heard or utilized do damage to the democracy as a whole.[17]

Since the revolutions of the 18th century,[18] human political progress has moved toward functional majority rule and minority protections. The former aspect, majority rule, has taken generally the same forms across the "Western" world while the latter aspect of minority rights has tended to incorporate a "universal" and "inalienable" character in its discourse, a search for a Platonic form of human needs. A kinship with natural law and a search for the way the world *should* be therefore unmistakeable. Indeed, the affinity of human rights, constitutional rights, and civil rights begins here.[19] But as legal scholars no longer hold out the hope that there is a realm from which natural law descends complete with instructions on how to protect minorities the question is not to search for a revealed wisdom but how society makes decisions which may place the interests of its citizens against one another.

It is quite clear that economic and financial logic does not free society from

[14] Dowding, Keith; Idem/Goodin, Robert E/Pateman, Carole, editors Chap. Are Democractic and Just Instutions the Same? In Justice & Democracy. Cambridge, 2004.

[15] Dowding, Keith/Goodin, Robert E/Pateman, Carole; Dowding, Keith/Goodin, Robert E/Pateman, Carole, editors Chap. Introduction: between justice and democracy In Justice & Democracy. Cambridge, 2004, p. 26.

[16] *Lingens v. Austria*, 8 July 1986, 8 E.H.R.R. 103: discussing the function of free speech in democratic society.

[17] inter alia Sen, Amartya *Inequality Reexamined*. Harvard University Press, 2004; Dowding; Barry

[18] With a brief hiatus in the 19th century as ideological movements undid much of the individual focus, encouraging trading individual rights for group and social class, Osiatyński, Wiktor *Human Rights and Their Limits*. Cambridge University Press, 2009, p. 7, and to some commentators into the welfare (police) states of the mid- to late-20th centuries.

[19] As William Blackstone discusses in his *Commentaries,1 Commentaries 125* natural rights are secured as private immunities, while the social contract that society "hath engaged to provide" becomes secured in express in law and are therefore "civil privileges."

making decisions. The allowing of decisions to be made by economic forces rather than democratic ones is what Robert Paehlke terms "economism."[20] Davy has similarly criticized the "doctrine of efficiency" for attempting to make environmental decisions devoid of social content.[21] While some of these problems might fall away if government stepped away from regulation, in that regulation is as often designed to fit a certain industries needs as much as it is designed to protect the social good, and instead allowed for a more Coasian or legal-based bargaining between collected individuals and a business-interest, the current regulatory-state's reliance on economism to justify decisions remains distortionary. Most problematic is the impact that the distortion has on the protected sphere of individual liberty in which democratic participation grows.

Notably, the research at hand was conducted at a time while the world descended into financial straits brought on by a storm of such "economism" failures.[22] A flood of investigative reporting in the wake of the ongoing localized wars and the tangle of exotic finances which now blanket the world's taxpayers in bailout debt help to illustrate *ad infinitum* how even arguably well-functioning—deep markets with much information and many informed participants— economic decision-making can spectacularly fail. Undeniably that failure has landed on the shoulders of individuals, forcing them to deal with fallout that they otherwise would not have.

In the current case, one might well argue that those affected in a global financial crisis constitute a (vast) majority in the world, not a minority. But the same is true of environmental justice. Again, environmental justice must concern itself with the situation of "minorities" knowing full well that those

[20] Addressed in his book; Paehlke, Robert C. *Democracy's Dilemma: Environment, Social Equity, and the Global Economy.* MIT Press, 2004. The term and idea bear some similarity to the views of the Physiocratic school of political economy, and in particular Françios Quesnay, in which the economy moves according to natural (physical) laws removed from democratic conversation. cf. Branco, Manuel Couret *Economics Versus Human Rights.* New York: Routledge, 2009, p. 103. Also note Karl Polanyi's use of the concept "market society." Polyani, Karl *The Great Transformation.* 2nd edition. Beacon Press, 2001

[21] Davy.

[22] Notably, popular books of the time, such as Naomi Klein's "The Shock Doctrine: The Rise of Disaster Capitalism ", Klein, Naomi *The Shock Doctrine: The Rise of Disaster Capitalism.* Picador, 2008; and Niall Ferguson's "The Ascent of Money", Ferguson, Niall *The Ascent of Money: A Financial History of the World.* Penguin Two, 2008 among many others showed some of the consequences of focusing tightly on what way "the economy" would want to steer societies. Equally any attempt to use aggregate and average data on where the economy seemed to be steering itself toward re-directing the economy would be unadvised.

affected are likely the majority of humankind.[23] The meaning of minority here therefore is a broad term invoking both racial and ethnic minorities within a country but also groups whose socio-economic and financial means place them in the power- and voting-minority.[24]

Justice research has established that there are certain "preconditions" that must be met to enable a democracy to function on both majority rule and minority protections,[25] preconditions that can be hampered by reliance on economic decisions. The need for personal discourse, as well as the benefits of its abstract and often un-characterizable nature, plays a central roll in Nussbaum's well-documented capabilities approach to justice, building justice amid and amongst the temporal dimensions of citizens and their socio-legal-political institutions.[26] The European Court of Human Rights has also explicitly recognized the role of a protected sphere in which to form democratic decisions: "Democracy requires that the people should be given a role."[27] That role must be adequately protected from encroachment. Interference with the respect for private life, where one develops democratic preferences, must be deemed necessary.[28] If such a sphere is necessary, and granting decision-making power to economic forces reduces these spheres in which citizens grow in their citizenship and make choices, then there must exist checks assure that those spheres stay free.[29]

[23] See esp. Martinez-Alier, Joan *The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation*. Edward Elgar, 2002, p. 176

[24] By way of percentages, in the United States where environmental justice concerns started, 1998 statistics found approximately 17% of poor households to be white, 34% black, 30% hispanic. Hence, unless such number change dramatically, there will be some significant overlap between poverty status and minority status relative to the environmental justice discussion. *See* Bowen, William M *Environmental Justice through research-based decision making*. Garland Publishing Taylor & Francis Group, 2001, p. 13. Simple numerical minorities follow easily from discussion of racial and socio-economic minorities, although population alone does not determine significance, a theme repeated explicitly in geographical economics, in Chapter 3, and Section 3.4.

[25] Hayward, Tim *Constitutional Environmental Rights*. Oxford University Press, 2005, p. 146-148, and notes therein.

[26] Nussbaum, Martha *Frontiers of Justice: disability, nationality, species membership*. Belknap Press, 2006, p. 78.

[27] *from Refah Partisi (Welfare Party) v. Turkey*, judgement of 31 July 2001. 35 E.H.R.R. 3.

[28] "Necessary" is a high hurdle in the eyes of the ECHR: "... 'necessary' in this context does not have the flexibility of such expressions as 'useful', 'reasonable', or 'desirable', but implies the existence of a 'pressing social need' for the interference in question..." *Dudgeon v. United Kingdom*, judgment of 22 October 1981, 4 E.H.R.R. 149, para 51. See also Handyside v. United Kingdom; *Lingens v. Austria*, 8 July 1986, 8 E.H.R.R. 103.

[29] For a recent and enlightening continuation on these themes, which unfortunately this research can only touch on, see Holland, Breena *Environment and Capability: A New Norma-*

It goes almost without saying that the rise of the environmentally regulatory state confirms that environmental decisions are under "economism" pressures. One can find ready support in environmental law literature, especially that discussing the precautionary principle[30] and cost/benefit analysis.[31] So can environmental problems have the same impact on the protected spheres as these other problems? Research shows yes, definitely. Continued alignment of environmental dis-amenities with certain groups of people certainly impacts their capacity for growth and development, and may even impact their ability to assess their potential needs. Kristin Schrader-Frechette notes, in deriving duties for environmental justice from democratic needs, that "urgent, economic survival, has provided [burdened groups] less time for the important democratic citizenship."[32] It also is a central theme in Holland's recent work, illustrating that "... because certain environmental conditions are necessary for producing and sustaining these material things, and indeed for making all the human capabilities possible, I [...] establish these environmental conditions as an independent 'meta-capability'. "[33] The intellectual tradition for this line of argument takes off from the now-established work of Sen and Nussbaum.[34] Indeed, this sort of cognitive adaption to prevailing realities might even be an explanatory factor in the relatively low interest in environ-

tive Framework for Environmental Policy Analysis. Ph. D thesis, The University of Chicago, 2005;Holland, Breena Justice and the Environment in Nussbaum's "capabilities approach": Why sustainable ecological capacity is a meta-capability. *Political Research Quarterly*, 61 2008. Holland (p. 323, 2008) explains the sphere-reducing imagery in the larger context of Nussbaum's capabilities approach as occurring "... because these systems do not deliver these materials [basic capabilities] regardless of our impact on them, a just society must protect their functional capacity to carry our such activities such as food production, waste absorption, disease control, and maintaining the chemical composition of the atmosphere." Note also Richard Dworkin's attention to how racism and prejudice can impact democratic functioning: Dworkin, Richard *Taking Rights Seriously*. Harvard University Press, 1978

[30]Sunstein, Cass *Risk and Reason: Safety, Law, and the Environment*. Cambridge University Press, 2004.

[31]Inter alia, and focusing on the environmental justice literature, Kruize, Hanneke/ Bouwman, Arno *The Distribution of Benefits and Costs of Environmental Policies: A Case Study on the Distribution of Environmental Impacts in the Rijnmond Region, the Netherlands*. Utrecht, 2003 – Technical report; Kiel, Katherine/Zabel, Jeffrey Estimating the Economic Benefits of Cleaning Up Superfund Sites: The Case of Woburn, Massachusetts. *The Journal of Real Estate Finance and Economics*, 22 March-May 2001, Nr. 2-3; Foreman Jr., Christopher H. *The promise and peril of environmental justice*. Brookings Institution Press, 1998.

[32]Schrader-Frechette, Kristin Human Rights and Duties to Alleviate Environmental Injustice: The Domestic Case. *Journal of Human Rights*, 6 2007, p. 121 (emphasis omitted).

[33]Holland *Political Research Quarterly 61 [2008]*, p. 320.

[34]Inter alia Sen; Nussbaum, Martha/Sen, Amartya *The Quality of Life*. Oxford University Press, 1993; Holland, a student of Nussbaum, serves as the environmental synthesis: Holland *Political Research Quarterly 61 [2008]*.

mental protection shown by the poor.[35] When one is struggling with more pressing economic survival issues, what energy is left to create a wish-list for environmental improvement? Moreover, what energy will be spent to make democratic decisions on environmental policy? As discussed below in Section 2.2, the fact that environmental impacts reveal themselves most strongly in the future and therefore incentivize current democratic choices only through a certain discount factor, becomes another illustration of problems for capabilities development. These results remind us that protecting citizens, and perhaps more strongly, protecting those in a minority subjected to the (environmental) decisions of the majority, serves a function in a democracy and is therefore more than a "green" or moral imperative.

Assuming for the moment that there is not a problem with the system of majority rule in place today, the myopia of both the market and the incentives intrinsic to political structure which allowed it to come to fruition[36] have the distinct and demonstrable ability to operate *against* minority spheres. This has been a concern at the highest level of justice literature and environmental problems have been shown to impact the same spheres that generated the concern for researchers of justice.[37] Moreover, the problem is dynamic and once in action continues to winch against the minority.[38] Barring for the

[35]Sunstein, Cass R. *Free Markets and Social Justice*. Oxford University Press, 1997, p. 257.

[36]Illustrated and explored by economists like Mancur Olson, e.g. Olson, Mancur *The Rise and Decline of Nations: Economic Growth, Stagflation and Social Rigidities*. New Haven/London: Yale University Press, 1982; idem *Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships*. Basic Books, 2000; to George Stigler, e.g. Stigler, George The Theory of Economic Regulation. *Bell Journal of Economics and Management Science*, 3 1971; and political scientists like John Gray, e.g. Gray, John *False Dawn: The Delusions of Global Capitalism*. Granta Books, 2002, p. 199. Also note Revesz, Richard L. Federalism and Environmental Regulation: A Public Choice Analysis. *Harv. L. Rev.* 115 2002.

[37]On the latter point, focusing on inequality's effect on development, see Wilkinson, Richard *Mind the Gap: Hierarchies, Health, and Human Evolution*. New Haven: Yale University Press, 2000; Wilkinson, Richard D. *Unhealth Societies: The affliction of inequality*. Routledge, 1996.

[38]Methods of action have all been proposed from many different fields which land minorities in this predicament. Steven Pinker, a psychologist, observed that society cannot be simultaneously free [to make choices], fair [ruled by laws and fairly represented], and equitable [guided by shared principles of fairness]. Pinker, Steven *The Blank Slate: The Modern Denial of Human Nature*. Penguin, 2003 David Donnison, a sociologist, observed in a report specifically on social justice to the British government, conveyed that the "injustice machine" has many different functional parts or dimensions, all interdependent on each other and each spinning towards increased injustice if they are not stopped simultaneously. Donnison, David *Act Local: Social Justice from the Bottom Up*. Commission on Social Justice, 1994 (13). – Discussion Paper; and cited in Barry, p. 14. Economists speak of a "race to the bottom" i.e. Sheldon, Ian Trade and Environmental Policy: A Race to the

moment an investigation on how to restructure majority rule to address the problem and the many concomitant problems that would arrive with such a ground-up revision of society, one can only turn to minority rights in order to balance modern democratic society.

Recognition of the problem is not entirely predictive of solutions, however. Barry[39] reminds us that "the need for really hard choices between [democracy and justice] arises only if 'democracy' and 'justice' become greatly at odds with one another; and the distance between them will deepen the nearer societies are to being truly 'divided' ..." The division here is exactly the world which social justice research worries is the reality of our world.[40] If the ratchet of environmental injustice is not a single mechanism but a combination of many injustices, operating on a divided people then a society can tick towards division faster than any single problem would move. This then necessitates "really hard choices." With social justice research already identifying and discussing many different mechanisms,[41] environmental justice becomes important not only in itself, but in the roll it plays in enabling the host of other social problems.

In general, environmental justice has not been seen in this light however. Instead of being a part of the more encompassing justice literature, or impacting majority rule and minority rights through its hinderance on the latter, environmental justice has been couched as a failure of law and regulation. While law and regulation should have done more to address the environment

Bottom? *Journal of Agricultural Economics*, 57 2006, Nr. 3; Singh, Ajit Labour Standards and the 'Race to the Bottom': Rethinking Globalization and Workers' Rights from Developmental and Solidaristic Perspectives. *Oxford Review of Economic Policy*, 20 Spring 2004, Nr. 1, and the pollution haven hypothesis. i.e. Copeland, Brian R./Taylor, M. Scott Trade, Growth, and the Environment. *Journal of Economic Literature*, 42 March 2004, Nr. 1. Other disciplines have joined together under the heading of "political ecology." Hornborg, Alf/McNeill, J. R./Martinez-Alier, Joan, editors *Rethinking Environmental History*. AltaMira Press, 2007, and citations therein. Even studies in historical societies have revealed how social structure and economic activities dictate the environmental situations of the culture, which in turn determine whether the culture grows or slowly divides or dies due to declining stocks of resources. Hughes, J Donald; Hornborg, Alf/McNeill, J. R./Martinez-Alier, Joan, editors Chap. Environmental Impacts of the Roman Economy and Social Structure: Augustus to Diocletian In Rethinking Environmental History. AltaMira Press, 2007; discussing the Roman civilization; also Myrdal, Janken; Hornborg, Alf/McNeill, John Robert/Alier, Juan Martnez, editors Chap. Food, War, and Crisis: The Seventeenth-Century Swedish Empire In Rethinking Environmental History. AltaMira Press, 2007, discussing the 17th Century Swedish experience.

[39] cf. Dowding/Goodin/Pateman.

[40] Esp. Wilkinson; Wilkinson.

[41] See, again, Holifield/Porter/Walker and notes therein, as well as Barry, Brian *Why Social Justice Matters*. Polity Press, 2005.

situation in particular, the fact that social justice is already concerned with so many other areas of detrimental impact on minority spheres of development it is highly unlikely that regulation would have been able to address all pertinent areas. As one's ability to grow democratically shrinks, one's participation in democratic affairs shrinks concomitantly. Any solution to environmental injustice must be cognizant of this dynamic and actively address it. And rights have been specifically developed to protect the minority sphere against the many ways which the majority might impact it. Rights have not however, as of yet, developed specifically to protect against how the majority can direct the environment itself against the minority.

2.1.2 More than Regulation

This is the current environmental injustice situation: there are environmental problems extending from many angles of modern life, ranging in detriment from innocuous to unlivable, but combining to create a landscape of distributed burdens and benefits. Where the distributions have been perceived as disproportionate, they have been catalogued by the environmental justice movement. Why though does this create a problem which will reach to the level of human rights? The first part of the answer is that the burden impacts the spheres necessary for adequate democratic participation by all citizens. These are the spheres supposedly protected by liberal rights and when left unprotected do damage to principles of democratic governance. One might not need to go to human rights fixes though, except on moral or completeness grounds, if other forms of oversight rectified the problems and could restore the sanctity and completeness of personal liberty.

The second problem then is the failure of regulation and law to fully address the environmental problems in a way that shores up the protections. Although one might still desire an environmental right to complete pantheon of rights protection the need would not exist at juncture if there was a regulatory "patch." Unfortunately though the cry for regulators to fix the malfunctioning environment-machine comes with less energy than it once did. A half-century removed from the publication of Rachel Carson's *Silent Spring*[42] and a plethora of agencies dedicated to environmental regulation distributed through western governments sit in awkward silence staring out the bureau-

[42]Carson, Rachel *Silent Spring*. Boston: Houghton Mifflin, 1962 (2002).

cratic window at continued environmental degradation. Davy notes that it is the distribution of agencies in fact that causes some of the problem. A unified planning policy, in his view, might side-step some of the gaps left in the proliferation of oversight agencies.[43].

Most crusades for fixing environmental burdens have equally focused on solitary problems or incidences. Even where those are successful the unaddressed problems continue to act against success, keeping any justice-minded goals on a proverbial treadmill. The existence of a burden can influence the likelihood of another burden moving with some gravity toward it,[44] and the continued success of preventing environmental problems in one area naturally put pressure on other areas, both near and far, to host the burdens which they do not want. The existing model of regulation thus has its work cut out for itself if it wants to function in the protective capacity necessitated by the need to protect the minority of a population.

The fact that the environmental justice "movement" remains most concentrated and cogent in the United States, a country which has Environmental Justice enshrined as a goal by its Environmental Protection Agency[45], makes it difficult to hold out hope that simple regulation will in short order succeed in fixing all interconnected problems. The intervening years and energy expended should have yielded some forward-looking protections by now. At best, protection has come ex post and in isolated fashion. Changing the environment after all "walks on two legs: one economic . . . ; two, technological."[46] Without a common, coordinating, and dynamic program, reacting to false steps or stumbles of either leg, regulation aimed at individual legs leaves regulation careening in the circles of crisis one sees when reading the environmental justice literature.

It takes political will to create a new or modified regulatory framework. It takes even more will to create a unified framework given the need to compromise and build coalition support. Such political will has yet to emerge.[47] Indeed, the trend in recent years has been toward splintered, special interest political entities rather than a growth of an ideology inside an existing polit-

[43] Davy.

[44] See Section 3.4.

[45] National Environmental Justice Advisory Council (NEJAC). See http://www.epa.gov/environmentaljustice/nejac/

[46] Martinez-Alier, p. 5.

[47] Though the climate change and sustainability paradigms offer a hope for the immediate future of a unifying force.

ical party.[48] But the failure to unify policy is not merely driven by partisan politics inside individual countries. The world is now globalized. There is an overlapping power and influence in the modern world, shared to some extent and fought over to another between expanding circles of influence which corporations and the classical power and influence of sovereign states share.[49] Internal political problems and the ability to codify political will into policy momentum are now compounded by external influences. And while this notion could generate much discussion, here it is sufficient to note that the overlapping spheres of influence come from more than just the power of the state. That reinforces the proposition that it is highly unlikely that a single policy reform—legal, environmental, civil, or international—can fully encompass the situation.[50]

Consider how the regulatory state already compartmentalizes risks. As White[51] explains, "specific events or incidents attract sanction, while wider legislative frameworks may set parameters on, but nevertheless still allow, other ecologically harmful practices to continue." The end result is a pock-marked landscape of regulated, tolerated, and unregulated risks with each pocket attracting its own independent level of oversight and continued attention. To require policy makers to grasp more firmly the risk-lever in making environmental choices, aiming at equitable distributions of risks, would require an entire reworking and, in many cases, *de novo* measurement, of the risks in society.[52] And that assumes control over all of those levels, something that globalization belies.

Certainly there is ground to be covered by increased regulation, especially

[48] As an anecdote in this direction, Niall Ferguson notes that, at the turn of the current century, there are twenty times more people involved with voluntary or self help groups in Britain than with political parties. The combined membership of the three largest political parties does even outnumber the membership of the Royal Society for the Protection of Birds See Ferguson, Niall *The Cash Nexus: Money and Power in the Modern World, 1700-2000.* Basic Books, 2001, p. 256.

[49] An idea codified prominently by Susan Strange; Strange, Susan *The Retreat of the State.* Cambridge University Press, 1996. But compare Ratner, Steven R. Corporations and Human Rights: A Theory of Legal Responsibility. *Yale L. J.* 111 2001, p. 462, comparing a corporation's power over its own employees and a single government's regulation of that power to the power corporations now exert over non-home States.

[50] The sentiment that the world in which we hope to effectuate change is increasingly polycentric is shared by Philip Alston, a prominent commentator on human rights and from whose work this research also draws. See Alston, Philip; Idem, editor Chap. The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accomodate Non-State Actors? In Non-State Actors and Human Rights. Oxford University Press, 2005.

[51] White, Rob *Crimes Against Nature.* Willan Publishing, 2008, p. 91.

[52] For an introduction to risk as a legal concept in this vein, see Davy, p. 78-87

environmental regulations focused on effecting environmental justice. The point here is not to imply that regulation is wholly without benefit.[53] Consider, for instance, an expanded tax on consumer goods which builds the price of waste disposal into the up-front costs, a system already at work in European countries such as Germany and the Netherlands. Besides forcing consumers to pay for their waste the tax inspires producers to minimize or eliminate gratuitous packaging and harmful processing chemicals as they all will inspire increases in cost that must be passed on, at least in part, to consumers.[54] The imposition of such a tax in the U.S., for example, would not be without environmental consequences. Regulation is not impotent.

Such policy however only addresses one problem. American goods consumed overseas, for example, would not be under the purview of US law, and consumer demand abroad would hike pollution at the production site. And this is only one stylized example. The literature has many more.[55] Without a coordinating goal, increased regulation or political will cannot be entrusted to solve an overdetermined problem. And until there is a supra-national coordinating environmental agency, some of those problems will remain impossible to determine within individual boundaries.[56]

Placing more burdens on the regulatory state, already burdened and in no way fast-acting when it comes to weighing the wishes of many environmental stakeholders is then at least arguably less attractive than finding a way to empower individuals. Much has been said of the power of individuals in the environmental justice movement itself.[57] There are problems with grassroots

[53]For all the ways in which regulation has been successfully applied to individual instances of environmental injustice, see most prominently, Gerrard, Michael B./Foster, Sheila R., editors *The Law of Environmental Justice*. 2nd edition. American Bar Association, 2008

[54]Barry, p. 82.

[55]E.g. Pellow, David Naguib *Resisting Global Toxics*. The MIT Press, 2007; Serret, Yse/ Johnstone, Nick, editors *The Distributional Effects of Environmental Policy*. Edward Elgar Publishing, 2006.

[56]If true change is the goal however we must recognize the warnings of Mancur Olson that "[t]he accumulation of distributional coalitions increases the complexity of regulation , the role of government, and the complexity of understandings, and changes the direction of social evolution." Olson *The Rise and Decline of Nations: Economic Growth, Stagflation and Social Rigidities*, p. 73, also p. 47. The failure of key global players to ascent to the Kyoto Protocol, the continued dispute about carbon emission regulation, and the debate on returns to banking restrictions mentioned earlier in this chapter highlight the warnings of Professor Olson and illustrate the current power of distributional coalitions over the desires of individuals on the world stage.

[57]For discussion of grassroots power, see inter alia Bullard, Robert D. *Confronting Environmental Racism: Voices from the Grassroots*. South End Press, 1993. Much is also made of the grassroots crusade in Hill, Barry E. *Environmental Justice: Legal Theory and Prac-*

organization, of course, but taking power into individuals' hands is nevertheless valuable relative to the complexities of global and domestic environmental regulation.

Commentators have noted that "[w]hile international environmental law has adopted more stringent standards, norms, and techniques for implementation it offers little recourse to individual victims of environmental harm."[58] The same can be said in national law and is especially visible in the U.S., where regulations promulgated by agencies are not necessarily enforceable by individuals.[59] The majority may make decisions, but what recourse is there for the negatively affected individual, who is by definition the minority if the decision was rationally taken? If the decision complies with existing regulation, and therefore garners the appropriate permit, there is likely little for the individual to do.[60] The individual used to be a deputy of environmental enforcement, the common coordinating principle around which policy is measured. This was the case before environmental regulation moved that burden upwards in to bureaucratic controls and technology and scale so eclipsed the relationship between individual and industry.[61] This is the contemporary situation with which modern regulation and regulatory agencies has grappled, the diminution of the individual relative to the regulated.

The weakness of the individual unfortunately extends below the regulatory level, where it might be expected, as well. The environmental justice story in the United States[62] shows quite plainly that even creative uses of law, especially utilizing non-environmental protections toward environmental ends, do not enable or empower aggrieved individuals or minority groups. Vicki Been, whose work played a pivotal role in the empirical definition of dispro-

tice. Environmental Law Institute Press, 2009; also Cole, Luke W. Environmental Justice and Entrepreneurship: Pitfalls for the Unwary. *Western New England Law Review*, 31 2009

[58]Dommen, Caroline; Picolotti, Romina/Taillant, Jorge Daniel, editors Chap. How Human Rights Norms Can Contribute to Environmental Protection In Linking Human Rights and the Environment. University of Arizona Press, 2003, p. 105.

[59]See Section 5.3.2.4.

[60]A large discussion of the affect of permit shielding occurs in Davy

[61]Commentaries by Bruce Yandle can be helpful in seeing the contrast between environmental policy control mechanisms and the common law or individual centric control. As an introduction, see Yandle, Bruce *Common Sense and Common Law for the Environment*. Rowman & Littlefield Publishers, Inc., 1997; also Meiners, Roger/Yandle, Bruce Common Law and the Conceit of Modern Environmental Policy. *Geo. Mason. L. Rev.* 7 1999; Meiners, Roger E./Yandle, Bruce Common law environmentalism. *Public Choice*, 94 1998 and Rose-Ackerman, Susan *Controlling Environmental Policy: The Limits of public law in Germany and the United States*. Yale University Press, 1995

[62]Chapter 5

portionate environmental quality in the formative years of the environmental justice discussion[63] similarly supports the likely ineffectual nature of single or simple government policies toward the multi-causal environmental injustice situation.[64] While one must be careful with such statements not to imply that simply because aggrieved parties have not by in large succeeded in changing the status quo that they are indeed harmed, the continued feelings of injustice, joined with the inability to realistically challenge the status quo must give pause to the democratic mindset.[65] If the individual is right, and moreover if that individual is, as Professor Been and the rest of the environmental justice literature help to illustrate, a minority or disadvantaged member of society, and furthermore if they do have a concern about their place in the common environment relative to larger utilizers, could they achieve change without an ability to challenge the status quo at international or domestic law?[66]

Again, none of the preceding is to say that regulation is not capable of solving problems, but rather that combined with a long history and established scholarship on the science of regulation[67] and the arguable trend away from individual ability to address problems, there appears to be a hole devoid of power into which persons may fall. Once in that hole they run the risk of decreasing their opportunities for democratic growth and realistic influence. Where regulation will not reach and individual access to legal instruments becomes non-existent the only thing remaining is for a movement among the aggrieved party or parties to influence or become the majority. As we discuss in Chapter 3, it is unlikely that the problems of environmental distributions will become a problem of the majority. If it did, then there would be a democratic method for rectifying the problem. Because of the burdensome factor intrinsic to all pollution, once it affects a majority it will not be allowed. This statement implies that a good strategy for allowing pollution is to modularize it, keeping each individual pollutive element a separate issue so that an aggrieved majority never coalesces. Instead, subgroups of minorities fight the atomized burdens.

[63] See Section 3.5.2

[64] Been, Vicki Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics? *The Yale Law Journal*, 103 1994, Nr. 6.

[65] Again, the recent "expansion" of the environmental justice dialogue is anecdotal evidence in this direction as well. See Holifield/Porter/Walker.

[66] For a more detailed introduction to the problems of challenging existing political and economic structures' utilization of the environment, see Hancock, Jan *Environmental Human Rights: Power, ethics and law*. Ashgate, 2003, Chapter 2

[67] Including Stigler, George The Theory of Economic Regulation. *Bell Journal of Economics and Management Science*, 3 1971.

Therefore and unfortunately, the minority must routinely influence the majority to effect change, a burden above and beyond the environmental burdens with which they are grappling. Such an outlay has been described as "wasteful" in squandering time, resources, and trust.[68] Squandering of trust also leads to entrenchment of each side along emotional grounds and thereafter a cessation of learning by which each side might move toward a compromise.[69] Forcing the system to recognize the blind-spot of the overall distribution of burdens is the manifestation of the "waste."[70]

The following example helps to illustrate at the outset why influencing the majority is so problematic. Here we introduce a type of environmental "bad" which was prevalent in the early environmental justice discourse. The goal of this short discussion is two-pronged. First is the common and relatively non-contentious observation that the bargaining power is unlikely to be on the side of the minority, or here the environmentally burdened. Much more damaging though is the common-sense objection of why society should burden the minority, who is fighting against disproportionate burdening, with the requirements of organizing to conduct the fight.

2.1.3 LULUs and the Organizational Problem

At the outset it is clear that environmental burdens have the potential to impact the protected sphere of individual liberty and thereby reduce their democratic growth. It is moreover a concern if those burdens impact less than a majority of the population as it leaves the particular minority in a numerical disadvantage to push politically for change. The majority votes to utilize a space for a purpose which will bring benefits to many but apply the costs to a spatially-localized few. The spatiality of environmental usage and the miracle of the modern interconnected, global market virtually guarantees that the benefits of utilizing the space will accumulate to a wider audience than do the burdens. And while the example to follow relies on "space" as a geographic area, the concept of disproportionate burdens easily extends to a broader conceptualization of space[71] that lends itself to other angles of social

[68] Davy, p. 239-40.
[69] Ibid., p. 243.
[70] Ibid., p. 242.
[71] Consider the higher exposure of the poor to auto emissions although they are the class with the lowest ownership of, and therefore least benefit from, autos. Such was studied in England Mitchell, Gordon/Dorling, Danny An environmental justice analysis of British air

science research.

Let us consider the arguments around Locally Undesirable Land Uses (LULUs) and the related "Not In My Backyard" (NIMBY) mentality. The acronym appears simultaneously as a rallying cry for communities fighting to keep burdens away from their neighborhood and in a pejorative sense by developers and town planning boards who struggle with the cost and benefit sides to the social problem and convincing the burdened to accept that burden. Here the term is merely used to fix ideas.[72] This spatial problem figured prominently in the early environmental justice literature in the U.S.[73] The basic idea is that there are some land uses which are beneficial to society as a whole but bad for those in proximity to the use. More concretely, LULUs can improve the tax base of a community and bring new jobs although they do contribute a set of burdens.[74] A better tax base can bring new roads, parks, and even lower taxes, a dynamic benefit which can catalyze growth in the community.[75]

Consider the possibility of individuals assenting to poorer environments for these job and economic improvements. Such a situation "is not only unjust,

quality. *Environment and Planning A*, 35 May 2003, Nr. 5

[72]Other acronyms, such as 'PIMBY': Put It In My Backyard or 'YIMBY': Yes In My Backyard, appear as campaign slogans of neighborhoods vying to accept LULUs for economic reasons. Even more colorful, and less kind, acronyms, such as 'BANANA': Build Absolutely Nothing Anywhere Near Anything, and 'CAVE People': Citizens Against Virtually Everything, land on activist groups when exasperated planning boards cannot win over an empowered citizenry with cost–benefit analysis. NIMBY, however, covers the general phenomenon without the obvious biases of the other terms and hence is the keyword for the concept in the literature. More recently, groups have coined the term NOPE (Not on Planet Earth), in response to activities that, while potentially economically lucrative, are seen as too dangerous for any location. There is also a related title, called "Drawbridge Mentality," which describes the tendency for people to create certain bonds with that locale and want to "pull up the drawbridge" behind them so that others cannot change or even have access to what they have set up. It is often applied to people who move to either remote, unspoiled, or relatively exclusive locations, as opposed to urban or suburban developments, but the mentality a dislike of changes runs along the same spectrum in both. See further discussion in Davy.

[73]Inter alia, Andreen, William L. Defusing the "Not in My Back Yard" Syndrome: An Approach to Federal Preemption of State and Local Impediments to the Siting of PCB Disposal Facilities. *North Carolina Law Review*, 63 1985; Brion, Denis J. An Essay on LULU, Nimby, and the Problem of Distributive Justice. *Boston College Environmental Affairs Law Review*, 15 1988;Been, Vicki What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undersirable Land Uses. *Cornell Law Review*, 78 September 1993, Nr. 1001;Idem *The Yale Law Journal 103 [1994]*

[74]Idem *Cornell Law Review 78 [1993]*, p. 1025

[75]For discussions and examples on the benefits brought through compensation for allowing LULU activities see Lambert, Thomas/Boerner, Christopher Environmental Inequity: Economic Causes, Economic Solutions. *Yale Journal on Regulation*, 14 1997, p. 214-21, Boerner, Christopher/Lambert, Thomas Environmental Injustice. *Public Interest*, 118 1995, p. 74-5,79

but also undemocratic, since such people are under an effective material compulsion to accept, and bear the brunt of, decisions in a way that others are not."[76] Thanks to this, and other[77] economic dynamics, people can become "environmental mercenaries:" one being paid to put their own body in the path of unseen projectiles.[78] Within the current system then the only way around this is for the people already touched by the system-imposed burdens to do more work.

The fact that the problem of a LULU (or NIMBY) exists though is evidence of a certain failure in planning and the ability of the burdened to affect planning outcomes. As Davy summarizes,

> LULUs and NIMBYs challenge the conventional wisdom of environmental and land use policy and law. The incapacity to resolve disputes over the siting of noxious facilities raises doubts about the legitimacy of social order, regulatory government, and the administrative state. [...] LULU blockage is not only about the local opposition against a prison, a power plant, an airport, or a hazardous waste facility. It is about the viability of the "orthodox" [efficiency] approach to the distribution of environmental amenities and degradation, or, more generally speaking, about the sharing of benefits and burdens.[79]

Moreover the phenomenon is quite widespread because LULUs can cover territory outside of polluting activities also.[80] Prominent among non–polluting LULU facilities are homeless shelters, substance abuse centers, AIDS clinics, halfway houses.[81] These uses fall into the same conceptualization as noxious

[76] Hayward, p. 155.

[77] Discussed in Chapter 3.

[78] In which case, society is adhering to the modified version of "Thous shalt not kill" proposed by Arthur Hugh Clough in 'The Latest Decalogue'; "Thou shalt not kill; but need not strive officiously to keep alive." cf. Barry, p. 133.

[79] Davy, p. 173.

[80] As Robert Bullard noted, environmental justice is more than "just [waste] facility siting." Bullard, Robert D. Environmental Justice: It's More Than Waste Facility Siting. *Social Science Quarterly*, 77 1996, Nr. 3.

[81] The term halfway house can have several meanings, depending on location, all with varying degrees of LULU status. Also known as bail hostels in the UK, such facilities are often locations where criminals, often approaching parole or release dates, are relocated to for short stays as a "halfway" step toward rejoining society. In this use, they are also termed "transitional facilities". The term can also though refer to locations of refuge where victims of household or domestic abuse or a variety of other dangerous situations can come to and escape the problems. The thought of having either criminals or people escaping from

land uses like landfills because the dangers, whether in the form of health damage from environmental problems or feelings of personal safety near certain facilities, are focused spatially on a neighbouring group while the benefits are spread widely, and therefore also diluted in the minds of the spatially-local group. The benefits accrue to society at large and appeal to those looking to aggregate the positives for a cost/benefit analysis and an, in some sense, efficient political decision.

For example—and as the first concrete illustrations of type of studies referred to environmentally unjust—New York City studied the siting of homeless programs in 1989 and found them noticeably less prevalent in the traditionally more wealthy neighborhoods. The study found that central Harlem, a historically black area, had more than sixty programs spread over only two postal codes. The wealthy areas of the Upper East Side, Murray Hill, Greenwich Village, SoHo, and Tribeca each had less than five.[82] The same LULU clustering appears in studies of the siting of houses for the mentally disabled, and halfway houses.[83] These non-noxious patterns of burdens then sit next to a set of pollution correlations, such as general air quality correlations and socioeconomic status, which are a current illustration of environmental injustice.[84] These statistics are only solitary observations, however, and due to different methodology studies from different locations and cities are difficult to compare between. Even when the pattern exists inside of the same country and/or regulatory structure it is difficult to compare and aggregate. Nevertheless, they are tangible pieces of the story that brought up the potential problems of spatially clustering burdens relative to the diffusion of benefits.

If the cluster of people subject to the burden wished to change the situation, what could they do? When everyone is given a vote and the opposing sides can voice the pros and cons to all the majority voice speaks. The minority vote, as usual, is left behind under the rationale that the best for the collective—greater "pros" than "cons"—was accomplished. In the pollution context, when

---

dangerous situations living in close proximity to one's own neighborhood is often unappealing to citizens, and therefore such facilities often draw opposition. A classic U.S. reference to halfway houses in the environmental justice context is found in *Nicholson v. Connecticut Half-Way House*, 218 A.2d 383.

[82] Been *Cornell Law Review 78 [1993]*, p. 1013.

[83] Ibid., p. 1013-14, footnote 63, citing a Boston study where the poorer southern end had one halfway house bed per 55 residents, while the entire rest of the city had one bed for every 847 citizens.

[84] American Lung Association Urban Air Pollution and Health Inequalities. *Environmental Health Perspectives*, 109 2001.

all the science, risk, and profit potentials are computed, the "efficient" outcome becomes where the pros outweigh the cons within the bounds of safety for the spatially burdened.[85] The rationale stands strong only when the minority has sufficient opportunity to *become* the majority, through campaigning, grassroots organizing, and by voicing their minority concerns through legally protected routes. That is, when the minority sphere of personal liberty is protected enough to allow for both their own apprehension of the facts around risks and burdens and therethrough to effect their preferred outcome. Otherwise there is a tyranny of the majority.

The emphasis on campaigning and achieving a majority is necessary in situations of spatially concentrated burdens because, save for green altruism or similar conservationist thoughts, it would be irrational for a non-effected, spatially-distant person from voting against the facility which would likely garner them even minimal benefits with no burden. The greater the benefits to the use of the environment, or, at a minimum, the greater the concentration of burdens *away* from those in the voting class who might receive any benefit, the less realistic the chance of persuading the majority against creating (or expanding or not to renew a license) a LULU.[86] To the extent that this is quantifiable, the situation arises where "past injustice leads to an ongoing injustice."[87]

Here tension arrives if not outright conflict.[88] In the market, individuals vote with their resources; resources that are clearly—especially in cases relevant to environmental justice—unequally endowed on the population. Their democratic representation however is limited to one vote. Democratic society gives everyone the same right to influence the allocation of resources within the State.[89] The dissatisfied attempt then to rectify the distribution using their enfranchisement, while the satisfied utilize their combined political *and*

[85]This is Davy's doctrine of efficient siting, Davy.

[86]To continue to link the point that democratic governance requires a realistic chance of the minority becoming the majority, and therethrough necessitates sufficient freedoms for the minority to develop their difference of opinion, note the sentiments developed by Hayek in Hayek, F.A. *Individualism and Economic Order*. University of Chicago, 1948, inter alia, p 29-30.

[87]Risse, Mathias How Does the Global Order Harm the Poor? *Philosophy and Public Affairs*, 33 September 2005, Nr. 4, p. 354.

[88]Both tension and outright conflict can be seen, *inter alia* in the negotiations around the Aarhus Convention, discussed infra in Section 4.2.4.2. Briefly, parties against the imposition of stricter environmental regulations justified their position not by detracting from substance of the regulation, but in building opposing economic arguments. cf. Hayward, p. 144.

[89]Przeworski, Adam The Neoliberal Fallacy. *Journal of Democracy*, 3 1992.

resource voting power.[90] Environmental justice writers specifically have noted this problem,[91] saying "... markets offer even fewer opportunities to the poor to meaningfully participate." This is an especially detrimental aspect of inequality

> because it affects public policy, altering the distribution of education, health care, environmental protection, and other material resources. This is true in rich countries as well as poor ones, regardless of the existence of elections and political parties.[92]

These are concrete illustrations of how the democratic system grants momentum—tilts the landscape—toward the usages preferred by the majority without a compensating protection or voice for the minority.[93] Further, this is not a new observation, but finds much earlier support in social justice now applied to environmental questions.[94] In general minorities become "persistent losers"[95] who find it difficult, if not impossible to change their situation while gover-

[90] See, inter alia Grossman, Gene M/Helpman, Elnhanan *Special Interest Politics*. MIT Press, 2001. In the U.S., 3/4 of presidential and congressional campaign contributions come from families earning more than $200,000USD per year. cf. Barry, p. 180 Rousseau noted similarly, and much earlier, that "[s]ocioeconomic inequality gives some in the community disproportionate influence over lawmaking and divides the community into hostile groups unwilling to submit their separate interests to the interest of all." Similar sentiments were stated by Armand de la Meuse in 1793, cf. Fleischacker, Samuel *A Short History of Distrubive Justice*. Harvard University Press, 2004, p. 61,71. Similar dynamics underlie the capture theory of regulation of George Stigler and public choice theory of Mancur Olson, among many others. Also note Okun, Arthur M. *Equality and Efficiency: The Big Tradeoff*. The Brookings Institution, 1975.

[91] Cousins, Ken *Smoke in the Skies, Bread on the Table*. College Park, MD, 2001 – Technical report, p. 5 (in address missing aspects of an early critique, Boerner/Lambert)

[92] Jencks, Christopher Does Inequality Matter? *Daedalus*, 131 2002, Nr. 1, p. 60; Also noted in the specific context of racism on which later chapters of this book touch (Chapter 5) in that failure of adequate participation "irrationality prevents an optimal use of human resources." Lawrence III, Charles R. The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism. *Stanford Law Review*, 39 1987, p. 330.

[93] The work of Eric Krieg, for example, finds evidence that when a locale's tax base is made up in large portions of industrial or commercial taxes, then these influence local government decisions and more likely to show externalized environmental hazards. Krieg, Eric J. The Two Faces of Toxic Waste: Trens in the Spread of Environmental Hazards. *Sociological Forum*, 13 1998; Krieg, Eric J A Socio-Historical Interpretation of Toxic Waste Sites: The Case of Greater Boston. *American Journal of Economics and Sociology*, 54 1995, Nr. 1

[94] Above the previous mentions, momentum or extra-voting power of the upper class was noted in Thorstein Veblen's *The Theory of the Leisure Class* even in 1899: "...the wealthier class comes to exert a retarding influence upon social development far in excess that which the simple numerical strength of the class would assign it." Veblen, Thorstein *The Theory of the Leisure Class*. Modern Library Paperback Edition edition. Random House, 1899 (2001), p. 147

[95] Dahl, Robert A. *A Preface to Democratic Theory*. University of Chicago Press, 1956.

nance cycles continue against them. Here,

> "[t]he problem is not simply that some people do not get the government they want, but rather that minorities do not get what they want on issues which are of importance to them but to which the majority is relatively indifferent."[96]

The injustice of clustered environmental burdens then fits both of the two criteria which Downs[97] noted as categorizing society's most intractable public policy problems: 1) they occur to a relative minority of a population, even if that minority is numerically significant and 2) the problems are caused in significant part by activities which provide substantial benefits to a majority or powerful minority of the population. The reason they are so intractable is because changing them requires painful losses at the most powerful levels of society.

So the free market added to majority rule does not necessarily create an equitable market; "[d]emocracy and the free market are rivals, not allies."[98] Rather, it further impacts the ability of the minority to impact the outcome, further reducing their ability to grow in democratically. Regulation could address this, however, by directing markets through the rule of law. The law can affect the "way the system operates to the advantage of some and the disadvantage of others, and to give greater priority to some social values over others."[99] But we have already noted the difficulties of a numerical minority getting the majority to move toward different social values.[100] The LULU "problem" thus reveals more intrinsic problems than simply difficulties in getting people to agree on were to sit undesirable facilities.

[96]Dowding, p. 36.

[97]Downs; cf. Beauchamp, Dan E.; Hofrichter, Richard, editor Chap. Public Health as Social Justice In Health and Social Justice. John Wiley and Sons, 2003.

[98]Gray *False Dawn: The Delusions of Global Capitalism*, p. 17; also Dowding/Goodin/Pateman, p. 19.

[99]Strange, p. 23.

[100]Even the statistics society chooses to collect are a reflection of the value judgements of those in charge, and not always a reflection of democratic deliberation. Sunstein *Free Markets and Social Justice*, p. 124.

2.1.4 Grassroots and Politics

Some environmental justice commentators are very positive about grassroots environmental justice and the ability to effect a change in majority opinion;[101] by pointing out the shortcomings of the system the majority will realize the irrationality and internalize their externalities. Others are less enthused.[102] Still others hope that should this grassroots campaign fail to convince then there are legal routes that could be engaged by a coordinated minority. If that is the case then there is somehow sufficient protection for the democratic concerns.

Indeed, there have been successes along these routes.[103] The research here does not focus on grassroots campaigns toward environmental justice for several reasons however. First and foremost, extensive comments thereto already exist, at least on the US front.[104] Unfortunately, the grassroots phenomenon is predominantly limited to the US, insofar as it functions under the banner of environmental justice. Most importantly though the potential for location-specific success does not inform the larger discussion of environmental justice; does the problem go away with a successful grassroots campaign achieves majority influence or finds a way to put a legal hold on siting, or does it shift to a "weaker" locale?[105] The "hyperspatiality" of risk "dictates that environ-

[101] inter alia and most recently Hill *Environmental Justice: Legal Theory and Practice*; Cole *Western New England Law Review 31 [2009]*.

[102] Notably, the outcome of Davy's treatise. Davy.

[103] Cole *Western New England Law Review 31 [2009]*

[104] Esp. Bullard *Confronting Environmental Racism: Voices from the Grassroots*; also Idem *The Quest for Environmental Justice*. Sierra Club Books, 2005; Hill *Environmental Justice: Legal Theory and Practice*, and notes therein. Also for examples and overview of many movements: Schlosberg, David *Defining Environmental Justice: Theories, Movements, and Nature*. New York: Oxford University Press, 2007. Outside of the U.S. literature note Dunion, Kevin *Troublemakers. The Struggle for Environmental Justice in Scotland*. Edinburg Universitz Press, 2003; McDonald, David A. *Environmental Justice in South Africa*. Ohio University Press, 2002.

[105] This is the "hyperspatiality" argument of David Pellow. See Pellow. See also Strohm, L. A. Pollution Havens and the Transfer of Environmental Risk. *Global Environmental Politics*, 2 2002. Also note Faber, discussing how "ecoliberalism" has been known to solve one environmental problem by transferring it to another group. Faber, Daniel; Faber, D., editor Chap. The Political Ecology of American Capitalism: New Challenges for the environmental justice movement In The Struggle for Ecological Democracy: The Environmental Justice Movement in the United States. Guildford, 1998, p. 29,38 Pellow uses the example of the Khian Sea saga in the 1980s to illustrate the chained effects, and often exceedingly long time frames involved. The Khian Sea saga saw incinerator ash from Philadelphia, the United States, criss-cross global ports, become partially dumped on Haitian beaches, buried in Haiti, and eventually returned to the US, and deposited in a landfill just outside of Philadelphia, 16 years later. See Pellow, p. 107-123. Another example of hyperspatiality with no actual reliance on long distances is the decision to install sulphur scrubbers on

mental harm will follow the path of least resistance from one location to the next [...]."[106] This take on the well known race-to-the-bottom means that environmental injustice can disappear at one spatial scale but reappear at another, a concept noted as far back as the early days of environmental justice research[107] but now emerging with substantial force in the globalized economy with its inability to coordinate environmental outcomes.

Of course, this is not to denigrate the abilities of grassroots campaigns nor their successes. Rather it points to a mechanism which will potentially undo those successes. Moreover, it is the same mechanism which tends to bring the environmental burdens to their door in the first place. The mechanics here and the evidence therefor are discussed in Chapter 3. Here it is sufficient to note that the mechanism exists.

These distributional dilemmas seem to pop up in even the best meaning projects. The World Bank itself has noted problems of equity stemming from its benevolent loans. This has been the case in relation to large-scale irrigation projects which, in the process of bringing farmland into being, can create significant changes in local economics, producing a new and more inequitable distribution of wealth.[108] Thus, even apparent success is not always lasting success, especially in the larger lens of social justice.

Above these reasons though it is unclear why the solution to the general problem of majority over-representation in deciding environmental distribution should be an emphasis on increased minority work and advocacy, especially when there is a non-zero cost to that advocacy. Consider the theoretical situation which exists if the circumstances surrounding LULU siting were

coal-fired power plants as part of the 1977 Clean Air Act (CAA). While the sulphur did indeed stay out of the air, the scrubbers then left tons of sulphur sludge which has to be disposed of on land. The situation—sulphur pollution—was not solved but slid into another problematic category. cf. Bowen *Environmental Justice through research-based decision making*, p. 224 Above circular transfers, singular success does not preclude the potential for economic and political reversals. Stories of grassroots success in bringing minorities into economic power can end in defeat when minorities inherit a political arena mired in debt and decay as a "legacy from the old order." Davis, Mike *Ecology of Fear: Los Angeles and the Imagination of Disaster*. Vintage, 1999, p. 405; discussing Los Angeles. See also Martinez-Alier, J Scale, environmental justice, and unsustainable cities. *Capitalism, Nature, Socialism*, 14 2003, Nr. 1; Gandy, M *Concrete and Clay: Reworking Nature in New York City*. Cambridge, 2002.

[106] Pellow, p. 236.

[107] *inter alia* Taliman, V Toxic Waste dumping in the Third World. *Race and Class*, 30 1989

[108] McCorquodale, Robert/Fairbrother, Richard Globalization and Human Rights. *Human Rights Quarterly*, 21 1999, p. 743.

approximated by Coasian conditions, including low costs to organizing and bargaining as well as well-defined property rights.[109] In the Coasian world, local residents would band together to bargain with the a facility or LULU to reduce or even eliminate environmental problems, assuming the facility already has the rights to pollute. The qualitatively identical outcomes of either accepting compensation for an efficient level of harm or paying—bribing—to appropriate the property rights from the facility are the classic dynamics in such a situation. If this were the case, firms would take potential bargaining and political action into consideration as they decided on location, knowing that the bargaining can extract income from the facility.[110] In any event, the outcome would be economically efficient in the sense of optimal non-zero burdens regardless of who started with the property rights.

In the real world, however, the potential for political action can depend on characteristics of the town or city where the LULU is headed, critically perhaps on the makeup of the people. It is no secret that money plays a part in a person's ability to start a collective aimed at bargaining. That money can be real expenditure or more simply the ability to forgo income and spend time working on a (non-paid) project like community action. To the extent that environmental clustering tends toward lower income or lower socio-economic brackets, as much of the environmental justice canon supports to one extent or another, these will be the groups who have the largest costs to organizing. It is true however that sometimes the lower status can be an asset. An interesting anecdote, supplied by Brion[111] illustrating a strategic play by justice advocates involves the strategic nomination of a wealthy community as a geographically superior, but politically infeasible alternative to a middle-income community site, in order to force the legislature to compromise on what function the middle-income LULU sites would eventually serve. Here, recycling was preferred over the originally desired solid waste disposal. While this is not bargaining in the Coasian sense, it does bend toward empowerment, or utilizing the particulars of the legal and political landscape in one's favour.[112] Nevertheless, Brion notes that the reality of the situation more often favors

[109] For a full discussion, see Davy Davy

[110] Hamilton, James T. Politics and Social Costs: Estimating the Impact of Collective Action on Hazardous Waste Facilities. *The RAND Journal of Economics*, 24 Spring 1993, Nr. 1.

[111] Brion, p. 439.

[112] Empowerment is discussed in greater detail in Cole, Luke W. Empowerment as the Key to Environmental Protection. *Ecology Law Quarterly*, 19 1992.

firms over communities as they have the resources to enable participation in bargaining, but also the resources which make the substance of the participation.[113] These resources for bargaining and strategy can be acquired by communities, but at a non-negligible cost, thus making a diversion from the Coasian-bargaining situation likely.

In the US, the EPA has acknowledged the problem of lop-sided power, at least tacitly, with the promotion of Supplemental Environmental Projects.

> "Supplemental environmental projects (SEPs) allow entities that violate environmental policies to provide funds to conduct environmental justice and environmental revitalization projects in small towns and rural areas. SEPs, with their voluntary commitments of funds by businesses and other entities, can support projects designed to promote public health and the environment, sometimes to a greater degree than fines and other punitive sanctions. The specific projects can be the product of negotiations between the government and the defendant or respondent in an environmental hazard case or may include other entities such as community groups or local elected officials. In any case, the final SEP should provide a public benefit to offset to some degree the impact of the environmental insult[114]."

Whether or not these do increase meaningful community and third-party involvement in environmental decisions is open to discussion.[115] Irrespective of

[113] Brion, p.444.

[114] Rosenthall, John *Supplemental Projects as Tools for Environmental Justice and Economic Development in Small Towns*. Human Rights Magazine, Spring 2004 (30). – Technical report.

[115] See also Hill *Environmental Justice: Legal Theory and Practice*, p. 422-425. Bowen expands here, wondering

> "... if high quality communication about environmental justice is to be obtained—by which I mean communication that enables the receiver of the message to trace clearly through language to the referent—it must necessarily include some measurements, mathematics or structural graphics. It must also have a clearly defined conceptual basis, so that the sender and receiver of the communication have a common frame of reference with which to interpret the meaning of terms. This necessity of including some level of measurements, mathematics, and structural graphics is in a sense unfortunate. Given the low quality of so much of the educational system, too many people directly affected by environmental risks do not have the intellectual discipline or command of language needed to meaningfully communicate about such risks." Bowen *Environmental Justice through research-based decision making*, p. 40

the outcomes, such official attempts to level the playing field, coupled with the emphasis on community organization in the face of LULUs and potential injustices,[116] points toward a world that is at a minimum tilted away from Coasian bargaining and therefore disinclined toward the voices of certain groups in environmental matters. The system, despite providing *potential* routes for the minorities' voice and protection has in practice not succeeded.

Overtones of fairness aside, this is all an example of two groups with differing views of the "good" use of environmental space and amenities attempting to coexist. The coexistence is not *a priori* based on a level discussion. Even so, and popular counterexamples notwithstanding, the side attempting to utilize the environment and inflict some spoilage in the process should not be unduly demonized. Unless one adheres to a policy of zero-pollution, a policy which itself does not arrive devoid of negative impacts on health and welfare, there are legitimate and efficient reasons to utilize the environment. Certain actions, such as expanding existing LULUs to take advantage of economies of scale, rather than opening new ones[117] bring more "bang for the buck," or more benefit for each unit of environmental degradation, and as such have much legitimacy that can be overshadowed by demonization.[118] Again, this is a single anecdote, but a useful one to mention early in the hopes of keeping emotions flat when discussing bargaining situations.

Although *both* sides may have good points in deciding where facilities should go, and indeed *either* outcome might be defended as correct, the question remains whether each side has an "equal" chance of achieving their outcome. The location which minimizes the damage to the surrounding environment or corrals human exposure and risk the best may not be the locations where firm decides to operate.[119] Public opinion against a LULU might be quite power-

[116] As in the latest environmental justice textbook: Hill *Environmental Justice: Legal Theory and Practice*.

[117] McDermott, Charles J. Environmental Equity: A Waste Manager's Perspective. *Land Use Forum*, 2 Winter 1993, Nr. 1, p. 16.

[118] For the critic, the degree or specifics of returns to scale in the industry is however not mentioned in McDermott's 1993 article. A recent capacity study in the UK notes that gains size of the operation do exist, but can be offset by transportation costs as well as in the increased potential for mistakes in handling and planning. See AEA Technology *Economies of Scale–Waste Management Optimisation Study*. UK DEFRA, April 2007 – Technical report. Callan notes that more modern facilities can offer ranges of services, notably recycling and disposal, and find increasing returns to scale in both capacities. Callan, Scott J./Thomas, Janet M. Economies of Scale and Scope: A Cost Analysis of Municipal Solid Waste Services. *Land Economics*, 77 November 2001, Nr. 4.

[119] Hamilton; Hamilton, James Towler *Politics and Social Cost: Hazardous waste facilities in a truly Coasian world*. Ph. D thesis, Harvard University, 1991.

ful. The magnitude to which this is true, and to which political opposition steers LULUs from active communities into inactive ones is however unknown. Research does show that community organization—at least in the political process—has a direct economic effect on the decision making process of firms. As Hamilton notes, using Coasian imagery,

> "the differing degree to which groups organize to demand compensation and raise a firm's costs of choosing a particular location drives a wedge between the social costs of its externalities and the costs voiced through the political process of its site selection."[120]

Other anecdotal evidence exists for effects outside of political organization in that hold-ups in construction to deal with collective action are costly to firms.[121]

In general then, the affected spatial minority is not powerless and one can generally assume that in any given LULU situation each side has tactics. The proponents of an environmental usage usually have a perceived monetary or political advantage, while opponents may be the underdogs but privy to their own tactics. The problem for the overarching democratic discussion however is that one has a hard time finding an environmental situation where the minority expected, from the outset, to be or be able to be equal to the majority. There is always significant costs to leveling the playing field. The tactics utilized by a minority, when successful, always colour the outcome as an upset.[122] This leads directly and quickly to a second component of the general complaint: the fairness is already stacked against the LULU-fighters. It is they

[120] Hamilton, p. 122.

[121] See Brion, p. 453-4, who although noting the successful halting effect simply delaying construction can have, it is unethical according to the American Bar Association to focus on delaying construction as a method to exhaust one's opponent. See also Johnston, Craig N./ Funk, William F./Flatt, Victor B. *Legal Protection of the Environment.* Thomson West, 2005, p. 84, noting that the public participation process brought in by the NEPA process (see 319) is both good and bad. For survey evidence reporting that both blacks and whites ranked community opposition as having stronger weight in the fight against siting than scientific evidence, see Mohai, Paul/Bryant, Bunyan Environmental Justice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards. *U. Colo. L. Rev.* 63 1992. These effects are also supported theoretically by the economics literature on competition for political influence. See, among many others, Becker, Gary S. A Theory of Competition Among Pressure Groups for Political Influence. *The Quarterly Journal of Economics*, 98 August 1983, Nr. 3.

[122] A good reason why Luke Cole, an influential leader in the environmental justice movement who had much success, attempted to use existing legislation as much as possible, before getting fancy with them, or as he stated, "with a twist." Cole, Luke W. Environmental Justice Litigation: Another Stone in David's Sling. *Fordham Urban Law Journal*, 21 1994

who have been forced to change course; their daily routines were disturbed by this LULU-proposal and they now muster their troops against the usage. The LULU-proponent, without exception, is coming from an institution—public or private—whose time is directed via either the profit motive or a public utility need towards the project. Whether or not they succeed in the final analysis in getting their way, or apply tactics which level the playing field, is irrelevant when fairness is viewed as the amount of energy needed for parties to get to the bargaining phase. The frontside of this argument is firmed up in Chapter 3 where theory demonstrates how the environmental quality-table has a proclivity toward planting environmental injustices at minorities' doorsteps, but for now the driving goal is an illustration that to push against an encroaching environmental usage requires a non-zero layout of time and energy, if not explicitly financial resources, from the group that is more likely to be at a numerical disadvantage already. As Davy expands,

> [d]ue to the competition between burden-avoiding communities, these risks are *more likey* to be imposed on communities with an uneducated, poor, and politically impotent population. On the other hand, it is *less likely* that a community with a highly trained, wealthy, and politically active population will be chosen by a developer for siting a hazardous waste facility. Moreover, it is also conceivable that the demographic and socioeconomic makeup of a host community, once a noxious facility has been sited, will change. [...] Without auxiliary and counterbalancing planning efforts, the distributive mechanisms of a free market society provide for a "likely" location, even if developers do not purposefully target economically depressed areas for siting LULUs.[123]

While not completely dispositive of a universal wrong (or evil), it is a failing that begs the question of why there is not an institution or legal arrangement in between which could forestall inefficient outlays of effort on the part of any minority group.

Thus, in a literature where successful grassroots campaigns are lauded, the social justice critique silently asks the question of why the campaign was necessary in the first place. Democracies function on majority rule coupled with minority rights. Environmental justice, stemming as it does from the nuances

[123] Davy, p. 238 (emphasis in original, references omitted)

of environmental and urban economics (Chapter 3) shows a proclivity away from outcomes preferred by the minority to which the burdens accumulate. While not all of these are "wrongs" and democracy does not guarantee the minority to get their way, they do tilt the table in favour of the majority without any concomitant protection for the numerical minority. This failing becomes most egregious when one considers that the problem is that a minority of the populace is by definition bearing a disproportionate burden for the rest of society, and the only way they can rectify or even hope to address the situation is through a laborious outlay of energy, especially relative to the capabilities of the forces behind the majority desire. If the environmental burdens impact the minority's ability to grow and participate democratically then there is the downward spiral of injustice with which social justice is so concerned, and which does so much damage to democratic principles. Those sorts of problems are what fundamental rights were created to address.

2.2 Health and Sickness

The above discussion places weight on the ways that groups can be at a disadvantage when it comes to projecting their wishes on majority proceedings. These weakness are generally speaking the vehicle in which environmental injustice arrives.[124] The disadvantages manifest themselves in continued burdens and a cycle back toward political organization. The potential for an unending cycle devoid of a realistic democratic brake pushes strongly toward a question of rights.

While the above is necessary to motivate the discussion and illustrate why this research moves rapidly toward the human rights approach, it is not sufficient.[125] There are other areas of existing law and regulation that could provide some level of protection against environmental burdens.[126] Although the planning and siting process is segmented to a degree that seems to allow for burdens to accumulate, it is well known that serious impacts on humans can still occur within the permitting of regulated locations and when that occurs

[124]The motor of that vehicle is discussed in Chapter 3.

[125]Of course, one might write an entire empirical study on the ability and inability of local interests to move against LULUs, of which Davy is a good start Davy; Hill has an current summary of grassroots campaigns, success and failures in the U.S. Hill *Environmental Justice: Legal Theory and Practice*.

[126]I.a. Gerrard/Foster.

legal action can be taken.

As such a reader could quite rationally ask why not look at the equity of the distribution of health rather than taking a step outward on the spatial scale to discuss environmental quality distributions.[127] After all, outside of the conservation movement, the concern with the health of the environment is an outgrowth with the concern for our personal health. The application of this in environmental justice directions would not be a big step; health issues are known to have a strong correlation to social and environmental forces,[128] and the number of chemicals introduced to the environment in the last century alone gives the issue an expectation of pervasiveness.[129] The question is then whether we can expect, or have yet seen, evidence that personal health considerations provide some part of the necessary protection found missing above.

There is no clear demarcation between environmental issues and social matters of all stripes—political, health, participation, risk, and information dispersion, among others.[130] They are all axes of inequality. Moreover, they are all dynamic factors of inequality, pushing current distributions forward in time through families, communities, education, and opportunity.[131] This, in general and at the outset, strongly implies that solving a health inequality will not solve inequality in general. That is not necessarily the goal here however. We only need to find sufficient protective measure to prevent environmental matters from hampering the democratic development of a minority.

Is there a way to push health concerns and especially health burdens toward protection from environmental burden accumulation? More firmly resting on empirical work, research shows that equalizing environmental burdens will not

[127] One could, *inter alia*, apply the work of Susan Cutter on distribution of hazards related to health and safety; Cutter, Susan *Hazards, Vulnerability, and Environmental Justice*. Earthscan, 2006; Cutter, Susan L Race, Class, and Environmental Justice. *Progress in Human Geography*, 19 1995, Nr. 1; As examples, see Bolte, Gabriele/Kohlhuber, Martina *PINCHE Project: Final Report WP5 Socioeconomic Factors*. Arnhem, 2005 – Technical report; Brulle, Robert J./Pellow, David N. Environemental Justice: Human Health and Environmental Inequalities. *Annual Review of Public Health*, 27 2006; Maclachlan, John C. et al. Mapping health on the internet: A new tool for environmental justice and public health research. *Health and Place*, 13 2007. Also see Liu, Feng *Environmental Justice Analysis: Theories, Methods, and Practice*. Lewis Publishers, 2001 for methodological considerations.

[128] Levins, Richard; Hofrichter, Richard, editor Chap. Is Capitalism a Disease? In Health and Social Justice. John Wiley and Sons, 2003; Wilkinson.

[129] Bowen *Environmental Justice through research-based decision making*, p. 14.

[130] The lack of a line in the intellectual sand between pure environmental issues and broader issues of social justice is also the theme of Ebbesson/Okowa, noted at p. 3-4.

[131] Barry.

equalize health outcomes[132], due to intervening and lasting effects of social class on outcomes. Put another way,

> wherever we put the starting gate, the different resources that people bring to it are liable to overwhelm the significance of the differential use they may make of those resources.[133]

By extension, then neither will fixing environmental burdens solve health problems; we still have class effects in the way. The point is merely that equalizing one aspect of life cannot guarantee an equalization of another. They are all pieces in the larger puzzle of social inequality, coupled with income inequality, historical patterns, and cultural lock-in. And because this is a complex, interconnected dynamic, the goal of working on one aspect is not to shore up another, but rather to put the brakes on the system.

The question then becomes would focusing on the disparate health impacts of all social ills be a better brake than working on environmental regulation? The weight of health concerns are on par with environmental concerns but arguably more objective and measurable. Could they then not lead the same charge to toward justice?

When one begins their journey into the environmental justice literature with the experience in the U.S.—as one almost must at this stage of development in the field—they are immediately thrust into the world of causality.[134] From questions of the causes of racism, the remaining momentum behind racial patterns in income, employment, neighborhoods and city blocks, to the more direct medical sense of what causes a sickness like cancer, causal chains are inextricable from the environmental justice discussion. Causality is the weak link in many of the environmental justice situations tested in court and has run up against large problems.[135] It is equally weak in building a chain toward using health concerns to stop environmental problems.

In the main, much work still needs to be done on all aspects of the environment-human chain. Measuring environmental quality and more importantly personal exposure is an as-yet unrealized quantitative goal. Moving from here, where science stands on the beginnings of quantitative environmental measurement and record keeping, to establishing causal linkages between negative

[132]Inter alia, Beauchamp;Wilkinson

[133]Sunstein *Free Markets and Social Justice*, p. 54.

[134]We explore causality problems in detail with regard to the US jurisprudence against discrimination.

[135]See Section 5.2.2

impacts and health outcomes is not a short step either. There is precious little data with regard to toxic exposure and health risk over longer periods of times. Admittedly, rough record keeping for some types of air pollution has been underway for centuries,[136] but detailed analysis and records are a rather recent phenomenon. There is even data less establishing effects from mixtures and combinations of many pollutants over a lifetime.[137] Thankfully, path-breaking work is underway and hopefully will inspire more researchers and government investment while bringing clarity to the discussion.[138] But even when that research exists, there is a real danger in relying on causal connections as either a lever to change policy or engage the legal system for protection. This is especially visible when one considers the dynamics of the most ubiquitous concern of human-toxin interaction: cancer. The following discussion, again, is not a complete picture but rather an illustration of the strong potential for weakness in the chain which connects health, the regulatory and legal system, and protection for a minority from environmental burdens.

2.2.1 Cancer and Causality

Cancer is a powerful spectre in the realm of humans and pollution exposure. Despite a frighteningly large number of lives lost cancer remains a notoriously difficult disease to which attach causality. As such, it provides an illuminating case study on the limited nature of protection available for environmental justice problems via connections with the health and environment. While one's soul revolts at the sight of a polluted community contending with multiple

[136] Brimblecombe, Peter *The big smoke: a history of air pollution in London since medieval times.* Methuen, 1987;Thorsheim, Peter *Inventing Pollution: Coal, Smoke, and Culture in Britain since 1800.* Ohio University Press, 2006

[137] Tyson, Frederick L. et al. Cancer, the environment, and environmental justice. *Cancer*, 83 October 1998, Nr. 8 Supplement.

[138] See, as an introduction Cutter. Also note studies such as Buzzelli, Michael Bourdieu does environmental justice? Probing the linkages between population health and air pollution epidemiology. *Health and Place*, 13 March 2007, Nr. 1; Buzzelli, Michael/ Veenstra, Gerry New approaches to researching environmental justice: Combining critical theory, population health and geographical information sciences. *Health and Place*, 13 March 2007, Nr. 1; Kohlhuber, Martina et al. Social inequality in perceived environmental exposures in relation to housing conditions in Germany. *Environmental Research*, 101 2006; Kruize, Hanneke *On environmental equity: exploring the distribution of environmental quality among socio-economic categories in the Netherlands.* Ph. D thesis, Universiteit Utrecht, 2007; Roorda, J/van Stiphout, W.A.H.J/Huijsman-Rubingh, R.R.R Post-disaster health effects: strategies for investigation and data collection. Experiences from the Enschede firework disaster. *Journal of Epidemiology and Community Health*, 58 2004; Chakraborty, Jayajit Acute Exposure to Extremely Hazardous Substances: An Analysis of Environmental Equity. *Risk Analysis*, 21 2001

cases of otherwise rare childhood cancers[139] and concentrations of adult cancers in industrial workers,[140] their existence, prominence, and ability to achieve public outcry have not reduced their impact nor led to widespread changes in how groups can defend themselves from such situations.

The goal here is not to demonize the industries which create both modern convenience and modern destruction for bringing disease or to imply that they are somehow covering it up.[141] The goal in this section is merely illustrate why their impact does not translate into cohesive routes for oversight, change, and/or remuneration that could prevent a need for rights-based protections.

Consider the basic requirement that, in practice, to change the current regulatory situation there needs to be a clear connection from a current or potential polluting source and a negative human health outcome. Negative health impacts provide the catalyst for change; the more clear and more negative the impact the greater the chance of necessitating change or granting leverage to the concerned cause. There is little less clear or negative than cancer. Therefore, if there are problems with establishing leverage with something as destructive as cancer, lesser pollution problems should run into relatively more difficulty in inspiring change.

Consider then the very different latency periods of cancers. There is a large difference in timing and duration of harmful exposure to a pollutant and the appearance of the cancer. The shortest cases, such as those after large-scale environmental insults like the nuclear detonations in World War II, exhibit attributable spikes in leukemia in just 18 months following exposure.[142] Exposure to ionizing radiation, a far less dangerous but still hazardous exposure, varies in its ultimate end in breast carcinomas to the tune of 5 to 30 years and depends on age at exposure and dosage.[143] The latter is the more common

[139]For discussion and details, see Lichtenstein, Paul et al. Environmental and heritable factors in the causation of cancer. *New England Journal of Medicine*, 343 2002, Nr. 2

[140]Of which notable examples in the literature include the Altgeld Gardens housing project in Chicago and the "Cancer Alley" in Louisiana. See Hill *Environmental Justice: Legal Theory and Practice*

[141]Pollution is not modern. Indoor air pollution has, as an example, been a standing problem for humanity. See Brimblecombe, discussing sinusitis in early man from smoke exposure inside rudimentarily-ventilated dwellings, to Medieval and Victorian London. Even Shakespeare lumped a "smokey house" as a deplorable and apparently common problem akin to a tired horse or a railing wife (cf. ibid., p. 4, citing King Henry IV, Part I, Act III, Scene I). The high-built chimneys of silver smelting furnaces in Iberia during the Roman era even illustrate a knowledge that the smoke was detrimental to the workers and immediate surroundings. See Hughes, p. 37

[142]Greaves, Mel *Cancer: The Evolutionary Legacy*. Oxford University Press, 2001, p. 73.

[143]Ibid.

progression from environmental problem to health outcome.

In all but the most egregious dosages the pathway from exposure to disease varies in time and intensity across a population. What does the variable reality of exposure and health outcome do for a lawyer defending a corporation (or a country) which, even admittedly, exposed people to a toxic chemical or continues to pollute an area like Altgeld Gardens or Cancer Alley? It certainly does not help propel a change in the protection of people from their environment.[144]

Greaves[145] does a remarkable job of summing up the problematic situation for the layman trying to understand exposure, latency, and causation of cancer that he deserves to be quoted at length here. What is also remarkable is how the dialogue on current views of cancer highlights how well Rachel Carson's *Silent Spring* foreshadowed modern themes, nearly half a century in advance.

> Since the majority of our cancers do not involve recognized acute initiation but rather chronic, sustained insults, we have less secure insight into the evolutionary time frames involved. Even so, it is clear that it is almost invariably very protracted. Prospective monitoring of patients with benign tumours or growths, for example breast tumours, intestinal polyps, or skin warts, that eventually progressed into florid cancers indicated that intervals of 10-20 years are common. For cancers historically associated with chronic industrial exposures to carcinogenic substances such as coal tars and oils or asbestos, the interval between first exposure and cancer has usually been more than 25 years and often 40 or 50 years. Similarly for cigarette smoking. Of course in these situations, we usually have no way of knowing when the first mutation initiating clonal evolution [of the cancer cells] actually occurred. Epidemiological evidence in melanoma and breast cancer suggests that cancers commonly appearing at around 45-55 years of age can be initiated in the teenage years. Lapses of 15 or more years have been observed in exposure to radium in small quantities. [...]

[144] Many readers will already be aware—perhaps from such popular stories and movies like Erin Brockovich—that defense lawyers find much to attack in environmental statistics. See Gardner, Dan *Risk: The Science and Politics of Fear*. McClelland and Stewart, 2008, p. 115

[145] Greaves.

> At any given time, however, there may be many cancers-in-the-making, but likely far fewer clinically diagnosable cancers. When does one then begin legal proceedings? When does one aggregate the sick into momentum for regulatory change? Further, would it be efficient to have individual citizens bring cases as instances or concerns of cancer arise, or to wait until there is a critical mass of statistically significant data to take to regulators?
>
> This uncoordinated time lag tangibly influences many people's perception of causation and intuitive weighing of risk. Hazardous sports and lotteries and a host of other activities have primed us to expect risks to be closely coupled in time with rewards or penalties. This, despite us being the only species with the ability to contemplate the future.[146]

Indeed, our intuitive ability to contemplate the future has failed us for some time, given that Rachel Carson told the world the story of the 7-8 year lag between the disposal of 1940s war chemicals and the sickness and death which followed on the US farms of the surrounding area in the 1950s.[147]

The phrase "influence many people's perception of causation and intuitive weighing of the risk" is especially important here. Those people are both employees and regulators. "The composite and probabilistic nature of risk for cancer, plus its extended time frame of evolutionary development, poses the major intellectual obstacle in understanding causation for the public and professionals alike.Greaves, p. 213 Further, the nature of the disease means that people will be in the dark on many aspects of its causality for many years to come. Consider finally the damaging effect that *different* latency periods can bring to the argument; if this cancer was a company's fault, why are there only two workers currently suffering, while tens or hundreds more were exposed and do not (yet) show signs of illness?

Currently, the stringency of current US regulation sets acceptable risks down to a one in a million chance of developing cancer due specifically to the ex-

[146] Greaves, p. 73-74

[147] Carson, p. 43 ; Rachel Carson included the following quote from Dr. David Price of the US Public Health Service (p. 188): "We all live under the haunting fear that something may corrupt the environment to the point where man joins the dinosaurs as an obsolete form of life. And yet what makes these thoughts all the more disturbing is the knowledge that our fate could perhaps be sealed twenty or more years before the development of symptoms." ibid., p. 226

posure from a properly constructed and maintained waste-to-energy plant.[148] Critics are quick to point out flaws and assumptions behind such anecdotes, but here it serves to show how policy makers already utilize the science, and especially how they put imperfect information to use for the potential good of society, at a cost of that one person in a million.[149] Confronted with the system of environmental regulation balanced on a multitude of such assessments, the inherent dynamics of cancers, the hope that people, via the legal or political system, could utilize the distribution of health in society as a red flag for the fight for justice begins to show cracks. Again, there are other sicknesses caused by environmental problems. Moving away to lesser health problems though reduces the power of utilizing the situation to foment environmental change. This is all not impossible to accomplish, but it is not a sturdy framework with which to build necessary protections. And no where does it address the fundamental weakness of the individual to *ex ante* empowerment.

It does not stretch the imagination or underestimate the pace of science to assume it will take generations of living—and dying—to work it all out. After all, the living and the dead are the grisly data points here. In the intervening years, policy and people will still make decisions on where to live, where to work, what to do with leisure time as well as what industrial exposures are "safe" and "permitted" as well as what air/water/soil qualities are allowable for our citizens. There is not enough protection here.

2.2.2 Correlations and Change

There are many statistical methods with which one can attempt to circumvent the problems with establishing causality between cancer and environmental damage. Findings correlations though is notoriously difficult to translate into legal success and therethrough to create protection. A finding of a correlation of one risk factor with a group might have, as part of the study design or necessity of time, left out other arguably more important or interesting risk factors, the lack of which leads to the conclusion that the correlation discovered is trivial or incomplete.[150] The relationship may well exist but the pathway from cause to effect gets a bit cloudier. One needn't mount an empirical

[148] Measured by living on the firm's fence line for seventy years. Lambert/Boerner, p. 215

[149] This critique of causality is not in any sense new, nor is its problems with connections to responsibility. For a relevant introduction, see Miller, David Distributing Responsibilities. *Journal of Political Philsophy*, 9 December 2001, Nr. 4.

[150] Bowen *Environmental Justice through research-based decision making*, p. 52.

study of legal strategy to see that poking holes in statistical weaknesses cannot be a minor strategy in defending permitting or regulatory standpoints. Did exposure at a workplace or living near the facility cause this cancer, or was it years of smoking, unhealthy eating at home, or stress? Even if it was not one of those factors alone, did they contribute to the exposure in a measurable way, thus detracting from the culpability of the exposure? An ability to "blame the victim" and the current culture of driving all problems down to individual decisions is variably termed market-justice[151] or discussed under problems with meritocratic thinking[152]: the victim "earned" their cancer through omission of care for themselves or by not working hard enough to stay healthy, among other projected faults in those unlucky enough.[153] The defense goes on; if there is a combined effect, does the company still shoulder a fraction of the burden?

It is easy to say that a government is causally and morally responsible for a cancer when they expose their soldiers to radiation[154] to observe the effects of nuclear fallout on armies. But what if that soldier also smoked, or was a beach-going tanner? What method can one use to empirically divide causal responsibility and thereby dictate a quanta of remedial responsibility to the military?[155] Suffice it to say if there are some exposed who did not contract an illness the problem is no longer "clearly" factory-produced carcinogen or the government-imposed assignment. There may be a genetic disease or variable, or a difference in the worker's past, unrelated to their employment or living location, that made them susceptible and therefore the singular "cause" is not (entirely) responsible. Causality and responsibility are the accepted motivators of change.

These exploits work in practice, despite knowing that cancer "is not a result of genetics alone; it is also caused by the environment.[...] There is an intimate interdependence among biological, genetic, environmental, and social factors."[156] And while this is unarguable now, the legal system, when engaged for environmental change still operates on the level of certainty. Proximity, or the spatial correlation with the pollution which usually serves as the metric in

[151]Beauchamp.
[152]Barry.
[153]Also discussed in literature under the heading the "just world hypothesis."
[154]Such as in the ECHR cases of *LCB v. the United Kingdom* and *McGinley and Egan v. the United Kingdom*.
[155]Miller, p. 457.
[156]Levins, p. 379.

any data, rather than a measurement of how long one was in "contact" with the pollutant, is a bridge further removed from exposure and risk.[157] Many intervening factors change exposure and risk relative to proximity measures.[158] There are also the inherent susceptibility of different individuals and variable climatic conditions that change the probabilities that proximity and exposure become a health problem.

As one places more and more links between "poor environment" and "harm to an individual" there are more areas for claiming a permit, regulation, or siting is or was safe. These are simply weakness which lend greater potential for the causal chain to snap. The simple ability to push against environmental protection, predicated on nothing more than the current system's necessary requirement of establishing substantial causation supports the conjecture that health concerns do not provide a satisfactory supplementary protection.

[157] Boerner and Lambert utilize a telling anecdote on connecting exposure/proximity to risk. The stringency of current US legislation brings risks down to a one in a million chance of developing cancer due specifically to the exposure from a properly constructed and maintained waste-to-energy plant brought by living on the firm's fence line for seventy years. See Lambert/Boerner, p. 215. Critics are quick to point out the limited view of risk here. New research pointing to links between lower oxygen content in the air we breath and ability for cancer cells to survive might make a more direct link between air quality and health possible, without a need to break down exposures to chemicals within the air. See Bakker, Walbert J./Harris, Isaac S./Mak, Tak W. FOXO3a Is Activated in Response to Hypoxic Stress and Inhibits HIF1-Induced Apoptosis via Regulation of CITED2. *Molecular Cell*, 28 December 28 2007. Also, for an explanation of oxygen's role in both helping and hurting cancer cells' chances for survival and growth Greaves.

[158] Kendall, P.R.W.; Public Health, Department of, editor *Determining the Human Health Risks of Environmental Chemicals*. Toronto: Environmental Protection Office, 1991; I.e. activity patterns which change the duration of contact/exposure; the changes in the location of people; and the age of individuals exposed. There is a special concern here for children. Studies highlight the exposure of minority children to lead and the tendencies toward lead poisoning. See Foreman Jr.; also McDermott, p. 14, discussing the Agency for Toxic Substances and Disease Report (ATSDR). *The Nature and Extent of Childhood Lead Poisoning in the United States*, A Report to Congress. 1988. The study showed that lead poisoning impacted black children at a remarkably higher rate—at least 2 to 1. The study included breakdowns by income as well. Although increasing income lowered black children's exposure to lead, it did so at a significantly lower rate than for non-minority children. The well-documented problems which lead exposure lead to highlights the life-long problems which environmental burdens bring. Also see, Hill *Environmental Justice: Legal Theory and Practice*, p. 434-438; McDermott, Charles J Balancing the Scales of Environmental Justice. *Fordham Urb. L.J.* 21 1994. General comments see the Center's for Disease Control and Prevention's (CDC) Advisory Committee on Childhood Lead Poisoning Prevention; `http://www.cdc.gov/nceh/lead/`. The study spotlights that 1) poor environments in which minorities and low income groups often live in can affect life course prospects and 2) the links from exposure are tightly and scientifically related to risk. Also see studies by the Columbia Center for Children's Environmental Health, cf. Barry, p. 48.

2.2.3 More Strains on the Chain

While an aging but still oft-cited statistic, the epidemiologists Richard Peto and Richard Doll concluded that no more than five percent of cancer deaths in the US were caused by exposure to advanced human technology.[159] More recently, the US National Cancer Institute attributed about 10% to industrial pollution, broadly defined.[160] While this is still not a small number, it is also not the magnitude one would hope to have as a weapon against polluters; it is certainly not large enough relative to the changes hoped for and catalogued by the environmental justice movement.[161] Larger numbers simply give much more power to a test of the chance that a polluting source is causing cancers and therefore a strong footing for change. Given the above discussion, a low incidence must be ascribed to the amazing resilience of the human body and not, without further evidence, to any intrinsic safety of exposure itself. But the exposure is unlikely to enable—or force—a wave of new protections.

Crucially though, this aging statistic is only referring to toxic exposures and features of technology. Epidemiologists in general claim that up to 90 percent of cancers can be traced to a "cause", though these causes can be cultural, diet, and exposure related.[162] These contrasting statistics sit with each other when one views cancer as arising through a ratcheting-effect: direct insults to cellular genetics combine with imperfect cellular oversight, which usually serves to correct (eliminate) cancerous cells, through repeated largely-indirect insults like diet[163] to ultimately bring a diagnosis of "cancer." Changes in exposure are not only coming from outside of our modern bodies either. Oxidative stress and tribulations of modern life are acting on a body which evolved in a far different world. Therefore, although 90% of cancers may have a "cause",

[159] cf. Greaves, p. 18

[160] McGinnis, J. Michael; Samet, Jonathan A./McGinnis, J Michael/Soto, Michael A., editors Chap. Attributable Risk in Practice In Estimating the contributions of lifestyle-related factors to preventable death. Washington, DC: Institute of Medicine, National Academy Press, 2005; Health and Human Services/National Cancer Institute Health status objectives. *Cancer*, 16 1991, Nr. 1

[161] To say nothing of problems one might like to change in the capitalist-ecological nexus. See Faber, Daniel *Capitalizing on Environmental Injustice: the polluter-industrial complex in the age of globalization*. Rowman and Littlefield, 2008

[162] Greaves, p. 117.

[163] Consider the rough statistic that primitive man, 15000 years ago, obtained two-thirds of the calories from wild fruit and vegetables, and the remaining third from lean wild game, including eggs and fish. Today's American receives one-half of their calories from milk products, cereals, and refined foods, with 17% coming from fruit and vegetables, 28% from domesticated meats. cf. Ibid., p. 186

only a much smaller percentage—perhaps as low as the 5% found by Peto and Doll—would pass the *but-for* test demanded for establishing legal causality in, say, a tort case. There is a definite dilution effect here which works against advocates for change.

These are all unfortunate echoes of stories as old as Rachel Carson's *Silent Spring*.

> "A group of Long Island citizens... had sought a court injunction to prevent the 1957 spraying [of DDT on Long Island]. Denied a preliminary injunction, the protesting citizens had to suffer the prescribed drenching with DDT, but thereafter persisted in efforts to obtain a permanent injunction. But because the act had already been performed the courts held that the petition for an injunction was "moot." The case was carried all the way to the Supreme Court, which declined to hear it."

None of this information shows even remotely that environmental degradation and physical pollutants do not "cause" cancer but it does illustrate hurdles in the legal and political routes, both then and now, for those who feel wronged by such degradation or the *potential* wrongs prior to the degradation.

Highlighting the amazing capacity of the human body to deal with a changing environment should not diminish social concerns with pollution and exposure; the discussion here is by no means arguing that the pollution in modern society is "safe." The today that humanity has built is bounded by the rather wide margin of error earned through eons of trial-and-error evolution. It is not hyperbolic to say that a cancer cell eliminated from one's body today is a talent earned by the deaths of many organisms to come before.[164] This is a world which, at least for many among the species, has brought great developments in human health, economic comfort, and technology.[165] But the human body's capacities are untested in radically new artificial environs and it stands to logic that times and situations can change too much, too fast, for even a machine forged over 2.5 million years of evolution.[166]

[164] Stephen Jay Gould referred to this mechanism as the "hecatomb" feature of evolution in which many, many organisms die as a species drifts through the evolution and mutation landscape acquiring such talents as anti-cancer policing.

[165] cf. Hayward, p. 151.

[166] The figure is expressed back to the general appearance of *homo habilis* and the *homo* genus. One could of course take the evolutionary time frame back even farther.

Given the tenuous chains of causality between harmful outcomes and environmental usage and despoliation environmental justice can not hope to effect all their desired outcomes by a focus on health effects. When one's goal is to force a polluter or a government to clean up their act, or to take into account the an accumulation of environmental burdens, either for the sake of human health or for the sake of the environment, one wants as clear a causal line as possible to engage existing legal routes. This section illustrates, albeit generally, how the causal chain for health has substantial weak links. The reduction in explanatory power equally reduces the expectation for political and legal power to take the role of protecting a subset of society. The weakness here is all the more glaring and disheartening for the advocate given the inherent weakness of the available political and regulatory processes discussed throughout the environmental justice literature.

One final point is in order with respect to attempting to address health as an indirect pressure on environmental distributions: how does one deal with children? The discussion up until now implicitly assumes a school of adults swimming through different regions of environmental quality. But we know that important aspects of child development which bear heavily on social justice begin as early as 22-months and then continue through the educational system. Such infantile factors are heavily correlated with the socio-economic status—and hence environmental quality—of the parents.[167] Above the sensitivity of children themselves to environmental problems[168] the nutrition and health of the mother is also critical to the development of the fetus, meaning the link between health and environment is especially weighty for pregnant mothers.[169] As such, children and mothers in any region of environmental quality will always be exposed to a more perilous quantity of pollution than other groups. These two groups tend to find more power to motivate change.

A gradient of danger also exists in income groups as it does for age brackets. Blood pressure, stress hormones, and even cancer all have demonstrable covariance with the kind of society in which we reside.[170] There is also evidence of a class gradient among adults within exposure to harmful substances, including smoking. Smokers of higher social classes are less likely to get cancer

[167] Barry, p. 47.
[168] Schrader-Frechette, p. 108.
[169] Geschwind, Sandra A. et al. Risk of Congenital Malformations Associated with Proximity to Hazardous Waste Sites. *American Journal of Epidemiology*, 135 1992, Nr. 11.
[170] Levins.

and more likely to live longer if they do than poor smokers, according to studies in the U.S.[171] The corollary of this is that in addressing health conditions, even ones as pressing as well documented in modern literature like exposure to lead in the home, carcinogens in the workplace, or even more omnipresent like air quality in a city, the poor will still suffer relatively more detriment than other classes.[172] To close with another health example,

> "[d]espite the unparalleled research effort which has gone into finding the causes of hearth disease, most of the modern epidemic is unexplained. Not only do behavioural factors explain only a minority of the social gradient [the difference in incidence between social classes], but they are difficult to alter. As Rose put it, if you are in the lowest risk category for all the behavioural risk factors, your most likely cause of death is still heart disease."[173]

here is even a known potential physical route within the body that can cause this; the effects of society on the body are not simply psycho-somatic. Levins relates research on how neurotransmitters, which are triggered by the cerebrum gathering social data via sensory input, are chemically similar to white blood cells.[174] With such a pathway, "we think with our whole bodies, we feel with our whole bodies, and so the whole body is the locus of social experience that comes with these patterns of chronic conditions [...]." Wilkinson continues to elaborates, taking this idea out of hyperbolic rhetoric and into a concrete problematic:

[171] Barry, p. 86. Wilkinson also relates a telling story about the size of the adrenal glands between the paupers dissected at beginning of the 20th century and the much smaller glands found in middle-class cadavers once that class began leaving their bodies to science. So odd were the new, smaller adrenals that they were given a named condition. Later did we find out that it was the original paupers' glands which were enlarged, ostensibly due to the chronic stress relative to the middle class. Wilkinson, p. 49-50.

[172] See esp. Ibid.. Barry (p. 87, 2005) continues, heading off critics claiming poor choices among classes are causing the outcomes that "[t]he differences in health and life expectancy that are left over after allowing for the effects of choices cannot all be accounted for... but they must arise from some way or other in which the better off enjoying a more favourable environment than the less well off." Wilkinson (p. 65-66, 2000), also supplies supporting evidence in that "[i]n the developed world, as much as half of the variation in population health... appears to be due to differences in income inequality alone."

[173] Wilkinson, p. 64, citing Rose, G Sick individuals and sick populations. *International Journal of Epidemiology*, 14 1985. One should note that although personal behaviour should not be employed to "explain away" injustice as a social phenomenon (blaming the victim, see, inter alia Barry), one must still account for personal behavioural variables in empirical studies, Bowen *Environmental Justice through research-based decision making*, p. 115

[174] Levins, p. 372

> To feel depressed, cheated, bitter, desperate, vulnerable, frightened, angry, worried about debts or job and housing insecurity; to feel devalued, useless, helpless, uncared for, hopeless, isolated, anxious and a failure: these feelings can dominate people's whole experience of life, colouring their experience of everything else. It is the chronic stress arising from feelings like these which does the damage. It is the social feelings which matter, not the exposure to a supposedly toxic material environment. The material environment is merely the indelible mark and constant reminder of the oppressive fact of one's failure, of the atrophy of any sense of having place in a community, and of one's social exclusion and devaluation as a human being.[175]

Combined with the empirical evidence that "one's body know's one's class position no matter how well one has been taught to deny it,"[176] this is a potent illustration of disproportionate impacts.

Finally, albeit more speculatively, a focus on health distributions does not lend an unambiguous direction for improvement. Claiming that one has some right to health or safety does not necessarily clean up the environment that caused the problem. Thanks to modern medical technology, health problems can be fixed by more than just removing the cause. Consider for the sake of illustration the situation in 17th century London, where rickets—a bone disease caused by low levels of vitamin D—owed at least some of its resurgence to the black skies which blocked sunlight necessary for children to metabolize the necessary nutrient.[177] The disease also owes something to malnutrition, as vitamin D deficiencies can be rectified through diet as well as sunlight exposure. Given this knowledge, would a populace have a right or claim to a clean(er) environment which could solve the health problems associated with rickets, or would a claim to the same end-state—namely a rickets-free environment—suffice? Disregarding the other health effects that the smog,[178] Can one jus-

[175] Wilkinson, p. 215.

[176] Levins, p. 373; discussing a study finding differences in juveniles' responses to and recovery from stress signals. Working-class children had prolonged rises in stress hormones (cortisol) while upper-class children had quick spikes and declines.

[177] Brimblecombe, p. 53-55. Historical stories lack the detail necessary for today's standards of causation but this story is merely an illustration. But the illustration certainly lived in the public consciousness, at least up into the 19th century and disaster novels like W. Delisle Hay's "Doom of the Great City", where London succumbs under its own poison fog and wastes. cf. Davis, p. 286

[178] A statement which may weaken the parable woven here, as I have yet to think of a

tify a claim to the environment when aiming first and foremost at improving health?

A more modern example comes in the form of anti-diarrhea tablet dispersal in areas of poor sanitation. Is there a right to not having diarrhea, or to a general human right to water?[179] Abstracting away from the modern technological limitations of anti-diuretics, and assuming technology could someday build a more perfect pill, it stands to reason that a fundamental right to a clean environment carries different obligations than an expanded right to life which recognizes the effects of environmental quality on life. This is a difficult path to tread. As Barry[180] notes,

> a deficit in health care can (to a greater or smaller degree) be cancelled by the expenditure of resources on medical care. But we at no point need to suggest that we are trying to equalize some composite score made up of each person's initial state of health and the quantity of resources devoted to his or her medical care.

Above all, and even if policy makers were to sit down and have a long conversation on the health/environmental nexus and the state's responsibilities therein, there is no inherent discussion of the minority of the population which is affected by the environmental burden in the first place; in all but the most dangerous and widespread cases, environmental problems can be expected to remain tilted toward fewer people.[181]

Suffice it to say that as technology and science improves, the ability to trade off biologic technology for environmental quality expands the grey area between using health indicators to protect the environmental and simply protecting human health. Protecting one is not the same as protecting the other, not now and not in the future. Further, once the "epidemiological threshold"[182] is breached, where degenerative diseases such as cancer and others associated with aging take over for infectious diseases as the major determinant of life expectancy, focusing on individual health enters areas of potentially

similar story or find a related anecdote in which a poor environment causes one reparable illness and one alone.

[179] Hill, Barry E/Wolfson, Steve/Targ, Nicholas Human Rights and the Environment: A synopsis and some predictions. *Geo. Int'l. Envtl. L. Rev.* 16 2003-2004; also note World Health Organization, *The Right to Water* (2003). Available at `http://www.who.int/water_sanitation_health/rightowater/en/`.

[180] Barry.

[181] Chapter 3.

[182] Wilkinson, p. 2.

significantly decreasing returns.[183] These are all reasons why we cannot expect the current legal and regulatory environment to respond to incidences of health problems in enough ways and with enough force to reinforce a personal sphere from majority choices. Unless health effects are supremely evident, there is little momentum available for change. While an environmental burden's effect on health is real, it simply cannot be expected in all cases to serve as the necessary erzatz lever of recognition. There must be something greater to draw attention and recognition of the minorities' environmental situation.

2.2.4 Discussion

While this is far from an exhaustive proof, it presses strongly against any assumption that there exist sufficient protections within the existing politico-regulatory system for the minority opinion. The evidence here suffices to grant motivation to check whether there is a stronger form of protection. One is certainly necessary given the detrimental effects continued and clustered environmental burdens have on those subjected to them. The concern cannot wait for health problems to rise to the defense of these groups either. This all leaves the individual at the mercy of a system which tilts the playing field.

But to step away from a focus on pollutants, risk, exposure, and health outcomes is not to step away from all that work teaches. Perhaps the strongest potential role for health-outcomes research in the environmental discussion is in linking environmental degradation to measurable expenditures on health care. Especially for the European countries[184] whose governments play a substantial role in health care provision, governments would seem to have a vested interest in improving the environment.[185] To the extent that social inequalities are powerful determinants of environmental exposures, and thereby also determinants of health outcomes, governments' incentives should be aligned with environmental justice.

[183] See, inter alia Rose, G *The strategy of preventive medicine*. Oxford University Press, 1992; Hertzman, C. *Environment and Health in Central and Eastern Europea*. World Bank, 1995. Wilkinson notes that individuals in societies which have passed the threshold can be more than twice as rich as others without being any healthier, implying that tackling an individual's problem's with quantitatively more or more expensive medicine is not unambiguously better. Wilkinson, p. 3.

[184] And, as of this writing, perhaps the US will move in a similar direction, if only with baby steps.

[185] Barry, p. 85;Wikler, Daniel Personal Social Responsibility for Health. *Ethics and International Affairs*, 16 2002

Environmental justice literature implicitly agrees with the view, used by cancer researchers and implied in the linkages between social inequities and health, that "cause" "should be considered in a broader context than those proximal events or agents—such as carcinogens in cigarette tar—that trigger disease and should include social, commercial, and political factors that have tangibly influenced risk."[186] This research, and indeed environmental justice research in general, resides in the realm of this extended definition of cause. The ethical is engaged because, at all levels of "cause", risks are not expected to be born equitably among a given population.[187] The political and legal is engaged because the peoples on which the "cause" is acted do not have realistic potential to change it. This all adds up to a situation for a minority of people that must be addressed by the majority, lest the majority continue to violate foundational democratic principles.

The use of the "case study" of cancer here is in fact a shortcut through the more exhaustive discussions on rights, causality, and responsibility that we will trace throughout the paper. Somehow an introduction utilizing the visceral dialogue of cancer is more suited to an introductory chapter than the voluminous theoretical discussion.[188]

But this is a suggestive glance at some reasons why social science is increasingly viewing such situations—perhaps as a necessity given the need to generalize across many fields—as the outcomes of *positional* situations.[189] To illustrate this term "positional," which can be used to modify many nouns, we use the example provided by Barry (p. 176, 2005).

[186]Greaves, p. 134, citing lines of arguments from biologist Richard Lewontin, Lewontin, Richard C. *Biology as Ideology: The Doctrine of DNA*. Harper Perennial, 1993; and science historian Robert Proctor, inter alia Proctor, Robert N The anti-tobacco campaign of the Nazis: a little known aspect of public health in Germany, 1933-45. *British Medical Journal (BMJ)*, 313 Dec 7 1996, among his other books on cancer.

[187]i.e. Schrader-Frechette. This work, as a first step, focuses on the human impact on other humans. There is much to critique there but admittedly crops the bigger ecological picture quite arbitrarily. The case could very well be made that the other species who our extended reach impacts should be considered. Inter alia Stone, Christopher D. Should Trees Have Standing—Toward Legal Rights for Natural Objects. *S. Cal. L. Rev.* 45 1972. This is an extensive path of research in the legal literature, focusing on the rights of all objects in a system in addition to human actors. See Collin, Robert W. Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice. *J. Envtl. L. & Litig.* 9 1994, p. 130-31. Non-anthropocentric concerns though will have to wait for just a moment longer. Hopefully if we can work out the intricacies of human rights to an adequate environment, we can move on to broader ecological rights.

[188]An introduction on hazard distributions and risk is found in Cutter

[189]The term "positional" in this usage is credited to Fred Hirsch, Hirsch, Fred *The Social Limits to Growth*. Routledge, 1976

> "In the job market, what matters is not how much education you have but how much you have in relation to others. If half the population have a degree, then a degree will become the minimum qualification for entry-level positions in many jobs that previously would have been filled by those who had completed secondary education but gone no further."

In this sense, when policy makers discuss environmental justice, they are discussing the morality of social mechanisms which partition better resources to better situated, regardless of the absolute magnitude of the resources involved *and* without questioning the morality behind the causality.[190] The same situation is also prevalent among the problems with income distribution. Consider Wilkison's statement that

> "[o]ne of the reasons for the continued interest in economic growth is a belief that every individual's desire for increased income can be summed into a societal desire for increased income. But given what we know about the power of income distribution and the importance of relative rather than absolute income, it is possible that this is based on a false assumption. Perhaps the individual desire for increased income is primarily a desire to have the things richer people have and to occupy the social position of richer people: that is to say, it may be primarily a desire to increase one's income."[191]

The question here then becomes, are we looking to improve the income of the disadvantaged class or the distribution of income? And, almost as importantly, which one is achievable? This research takes the view that, given the need to protect a minority from the environmental choices, intended and unintended, of the majority, and the inability of political discourse to guarantee protection that something substantially more is implied.

After over three decades of environmental justice research, the interesting questions are no longer of the analytical type, aiming to elucidate the quantita-

[190] The idea is not entirely novel. Consider an interpretation of obscenity as having no intrinsic definition itself, but can only be obscene in relation to other, external, metrics. Janis, Kay, and Bradley note English law, see *Director of Public Prosecutions v. Whyte* [1972] A.C. 849,864, [1972] 3 All E.R. 12, 21. Janis, Mark W./Kay, Richard S./Bradley, Anthony W. *European Human Rights Law.* 3rd edition. Oxford University Press, 2008, (p. 250

[191] Wilkinson, p. 216.

tive relationship between race, class, or income and environmental factors.[192] One can rest assured that inequality exists, in environmental matters just as in many others touched on by social justice research. The inequality does not, however, condemn the system in which it resides. As Risse remarks, "The global order is not fundamentally unjust; instead, it is *incompletely* just. . . ".[193] Policy can endeavor to make it more just by granting some power back to those in the minority who are currently deprived of it.

It was this discussion that this chapter meant to highlight, reasons for the shortcomings of established policy mechanisms through which the environmental justice movement has laboured. The problems are real but the existing solutions are expected to be weak. Further, these shortcomings are not likely to go away. The illustration sets the stage for a new policy. A right to the environment cannot be justified by appeals to democratic principles alone[194] but the lack of democratic protection coupled with lack of auxiliary protections does push the conversation in that direction.

The conversation thus rises to the level of human rights because of the intrinsic weakness of existing democratic and legal pathways toward change. There is of course the open question of the ethics of placing the burden of organizing and energizing the change on the people who the environmental burdens are being placed should that route be significantly empowered to affect protection where the existing policies do not.

With this in mind the following chapter demonstrates the methods by which environmental injustice propagates. So far the idea that environmental burdens agglomerate and tend toward positions affecting a numerical minority[195] has only been conjecture. Should burdens begin to impact the majority existing mechanisms are engaged for rectification or at least compromise and there is the potential for political turnaround. In that case there is no problem left to be identified as an environmental injustice. The following chapter uses both the existing canon of environmental justice research and economic theory to support the mechanics which bring about and concentrate burdens. The investigation supports the otherwise rhetorical discussion in this chapter with

[192] Schweitzer, Lisa/Stephenson Jr., Max Right Answers, Wrong Questions: Environmental Justice. *Urban Studies*, 44 February 2007, Nr. 2.

[193] Risse, Mathias De We Owe the Poor Assistance or Rectification? *Ethics and International Affairs*, 19 2005, Nr. 1, p. 10.

[194] Hayward, p. 129; Hayward also notes that while principles of democracy cannot fully justify an EHR, they also do not stand in the way of such a right.

[195] See Section 1.3.

some degree of rigor and helps to clarify the pessimism toward the established routes for environmental change. If environmental justice problems are a fundamental tendency and pathways for the minority to fix them are limited then protective action becomes warranted.

3 Movement of The Environment

> Engineers, like politicians, are concerned with the art of the possible, and this requires us, above all, to think realistically about what people actually are, and how they got that way.
>
> *Daniel C. Dennett*

The established environmental justice literature shows that one should *expect* disproportionate distributions of burdens, and that they are *likely*—as documented by the environmental justice movement itself—to affect a minority of individuals. This chapter illustrates the theory behind those expectations and proclivities. The end goal is to connect with the preceding chapter which fixed the idea that a minority will find it difficult to effect change politically due to a deficit in influence. While not a formal proof, the explications here lend, at a minimum, no reason to believe that the junction of economic systems and environmental use will not move against a minority of the population. With these dilemmas in mind, one is pressed to ask questions of a human rights nature. The hypothesis of this research thus fully emerges from the discussions of this chapter.

This chapter explores the propensity toward environment injustice via market mechanisms using many examples from the U.S. literature and augmenting that discussion with European bridge work where possible. Despite the need for environmental justice research to be more clear on what exactly "disproportionate" is, especially what distributive outcome is the comparator which reveals a disproportionality,[1] the purpose of this chapter remains to demonstrate the propensity of the economic system in and of itself to distribute

[1] Noonan, Douglas S. Evidence of Environmental Justice: A Critical Perspective on the Practice of EJ Research and Lessons for Policy Design. *Social Science Quarterly*, 89 2008, p. 1162.

environmental quality. Evidence of a distribution's tendency toward impacting lower socioeconomic classes—contentious in some points, but relevant to the human rights aspect—ties the neutral discussion on economic mechanics to environmental justice proper. While this chapter will not establish that the environment is always and everywhere distributed such that the poor and minority populations of traditional environmental justice literature receive all the burdens of modern pollution, it does demonstrate exactly why policy should not operate from the opposite assumption, that the market will adjust itself toward any sort of equitable distributions.

The majority of the evidence presented here comes simply from the developed discussions in the U.S. There is no expectation though that economic dynamics or environmental impacts will differ in any other context. The desire to rest the mechanics directly on a firm footing necessitates the discussion of economic theory, not any desire to firm up the more limited literature in Europe. In fact, the literature that does exist makes the point quite explicitly, especially the newest and most developed work.[2] There is simply more evidence to work with from the U.S. experience. And while some of the discussion there cannot be carried in to Europe, especially the racial overtones,[3] it still overwhelmingly illustrates the expected, tilted environmental playing field and the problems those on the downhill side experience.

Understanding the tendency toward awkward distributions helps guide in asking the right questions about environmental justice. The dynamics illustrated here, stemming first from the established environmental justice literature and then adding some new tools of economics,[4] couple with the democratic problems in Chapter 2 to demonstrate why environmental justice is such an intractable phenomenon. This is relevant because the idea of environmental justice is quite a bit older than the conception of environmental justice one is most likely to encounter during a quick internet search. In fact, early recognition that environmental policy can have localized effects[5] can be found in comments during the 1970s on the then-emerging ecology movement, long before the 1982 Warren County protests which often serve in the literature as the movement's beginning. In 1973, Faramelli saw that "ecology is a profoundly serious matter, yet most of the solutions suggested for environmental quality

[2] Esp. Section 3.6.
[3] Discussed more fully in Chapter 5
[4] Section 3.4
[5] There, on the poor and minorities

will have, directly or indirectly, adverse effects on the poor and lower income groups."[6] Wolpert similarly commented in 1976 on tendency for regressive siting of public facilities.[7] Early and notable work by environmental economists also led to the conclusion that lower income predicts lower environmental quality.[8]

It was however the socio-political reality in the United States that loaned a directionality and a momentum that launched environmental justice on a productive but unfinished path.[9] Most new literature however is moving away from the empirical and methodological discussions which marked environmental justice's formative early years. The empirical debates which served to boost environmental justice to its current status though left critics unsatisfied and policy changes unfulfilled, and are being either left behind or situated in what can be seen as this generally larger "new"—or perhaps, renewed—discourse.

The traditional dialogue of environmental justice seems then to have been asking the wrong questions, focusing on the status of the individuals on the receiving end of burdens. The idea of environmental justice was searching for a succinct expression while at the same time advocating for much-needed change and this change needed empirical backing. Coupled with the recent court cases there which shut down the most fertile area of commentary,[10] scholars have slowed their pace on environmental justice relative to the pace in other fields. The new, expanded discourses though are less focused on quantifying the disproportionate distributions of environmental quality, or utilizing those results in the courtroom as a lever of change, than it is about the ebb, flow,

[6]Faramelli, Norman T.; Barbour, Ian G., editor Chap. Ecological Responsibility and Economic Justice In Western Man and Environmental Ethics. Addison-Wesley Publishing, 1973, p. 188.

[7]Wolpert, Julian Regressive Siting of Public Facilities. *Natural Resources Journal*, 16 1976.

[8]Freeman III, A. Myrick On Estimating Air Pollution Control Benefits from Land Value Studies. *Journal of Environmental Economics and Management*, 1 1974; discussed below. Note these studies too with debates on whether race or income are better predictors of hazards. See Cousins, Ken *Smoke in the Skies, Bread on the Table.* College Park, MD, 2001 – Technical report; Foreman Jr., Christopher H. *The promise and peril of environmental justice.* Brookings Institution Press, 1998

[9]One should mention the connection with the United Farm Workers' Union's fight against pesticides and the conditions of black garbage collectors as publicized by Dr. Martin Luther King Jr. in the 1960s. Such was the first environmental law suit to utilize civil rights statutes in 1979 and could have equal claim to being the first environmental justice case.

[10]E.g. Note After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement. *Harv. L. Rev.* 116 2003; Core, Lisa S. Alexander v. Sandoval: Why a Supreme Court Case about Driver's Licenses Matters to Environmental Justice Advocates. *B.C. Envtl. Aff. L. Rev.* 30 2003; See Section 5.3.1

and ramifications of observed phenomena.[11]

In sociology, the new questioning has meant quite literally an expansion of how "space, place, and scale" matter in investigating situations of environmental injustice.[12] Though not entirely a new notion, the strengthening of this strand of thought connects the environmental justice discussion more directly with established discourse on social justice.[13] It also connects to the new quantitative approach of geographical economics which brings explicit recognition of agglomeration dynamics into spatial studies[14], explaining "why certain economic activities tend to become established in particular places"[15]—a necessary addition to the environmental justice canon since the pioneering critiques of Been.[16] This helps establish a theoretical base for the causality of the picture the environmental justice-movement contends with in the modern world. It is not, however attempting to serve as that missing legal lever by redefining causality.[17] Studying the agglomeration tendencies of industries is full of insights into the patterns of pollution with which environmental justice concerns itself,[18] while more traditional economics and sociology tie the results

[11]Similar in idea to note is available in Walker, Gordon Beyond Distribution and Proximity: Exploring the Multiple Spatialities of Environmental Justice. *Antipode*, 41 2009, Nr. 4.

[12]Holifield, Ryan/Porter, Michael/Walker, Gordon Introduction: Spaces of Environmental Justice: Frameworks for Critical Engagement. *Antipode*, 41 2009, Nr. 4; Walker

[13]See Holland, Breena Justice and the Environment in Nussbaum's "capabilities approach": Why sustainable ecological capacity is a meta-capability. *Political Research Quarterly*, 61 2008; and discussions in Chapter 2

[14]Inter alia, and discussed herein include Combes, Pierre-Philippe/Mayer, Thierry/Thisse, Jacques-Françios *Economic Geography: The integration of regions and nations.* Princeton University Press, 2008, Huriot, Jean-Marie/Thisse, Jacques-Fran cois, editors *Economics of Cities.* Cambridge, 2000; and especially Bowen, William M/Atlas, Mark/Lee, Sugie Industrial Agglomeration and the Regional Scientific Explanation of Perceived Environmental Injustice. *Annals of Regional Science*, 43 December 2008, Nr. 4, so far one of the only environmental justice-applications of agglomerative measurement. See Section 3.4.

[15]Fujita, Masahisa/Thisse, Jacques-Fran cois; Huriot, Jean-Marie/Thisse, Jacques-Fran cois, editors Chap. The Formation of Economic Agglomerations: Old Problems and New Perspectives In The Economics of Cities. Cambridge, 2000, p. 3.

[16]Been, Vicki Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics? *The Yale Law Journal*, 103 1994, Nr. 6; idem What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undersirable Land Uses. *Cornell Law Review*, 78 September 1993, Nr. 1001; Section 3.5.2

[17]Discussed *infra* Section 3.4. Further in economics, though not discussed in detail here, environmental justice themes run strongly through ecological economics literature, an offshoot and sometimes competitor to more traditional environmental economics. Daly, Herman *Ecological Economics and Sustainable Development, Selected Essays of Herman Daly.* Edward Elgar, 2008; Martinez-Alier, Joan *The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation.* Edward Elgar, 2002; Costanza, Robert et al. *An Introduction to Ecological Economics.* CRC Press, 1997.

[18]After all, "[t]he geographical areas in which these industries concentrate include many, if not most, of the same facilities at issue in environmental justice analyses." Bowen/Atlas/

rigorously into the realms of justice. Establishing the expectation bypasses the need for narrowly-defined causality which so defined earlier environmental justice literature and pushes the hope of solution into the all-encompassing fundamental rights territory.

3.1 Naming Issues

There is no better illustration as to the many other questions which have fallen, and continue to fall under the heading of environmental justice than to look to the other titles which this research has garnered in the past. These titles have clear implications for the direction of inquiry and inform the reader as to why this work—and indeed, most others—continue to use the "justice" moniker while helping to wade from the preceding general discussions into the deeper specifics to come.

One could argue that the phenomenon under discussion is better situated under the more neutral of the terminology:"environmental equity." "Environmental equity" was indeed the first choice to describe disproportionate environmental impacts by the U.S. Environmental Protection Agency (EPA) in 1992. The original title though fell out of favor with the EPA because it "implies the redistribution of risk across racial groups rather than risk reduction and avoidance. . . ".[19] The fixation at the regulatory level was with race, which at the time was the driving concern for the fledgling movement.[20] Equity does imply an equalization of sorts, but not necessarily of risk, nor necessarily across racial groups. Equity, minus the EPA's concerns at the time, is actually the most general phrasing which would inspire inquiry as to the distribution of burdens and benefits and is the term which is gaining now importance in Europe. It does not, however, explain why the various "bads" discussed within the environmental justice movement should be "equalized."

The racial history of the U.S. also granted a more inflammatory labels to original questions of disproportionate burdens., *Environmental racism*, a term which provides another framing to the problem and focuses on the characteris-

Lee

[19] cf. Kuehn, Robert R. A Taxonomy of Environmental Justice. *Environmental Law Reporter*, 30 2000, p. 10682.

[20] For the original EPA terminology discussion, see U.S. EPA *Reducting Risk for All Communities, Vol. 1: Workgroup Report to the Administrator*. Washington, D.C., 1992 – Technical report.

tics of the unequally impacted group, rather than the unequal situation itself. Robert D. Bullard, a prominent name in the field, defined the term as "any policy, practice or directive that differentially affects of disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color.[21]" This definition is only slightly softer than Benjamin Chavis' earlier definition of environmental racism as "...racial discrimination in the *deliberate* targeting of communities of color for toxic waste disposal and siting of polluting industries..."[22] The terminology naturally drove questions as to the reasons and causality behind observed distributions, implying that if the disproportionate burden was a ubiquitous phenomenon then the question of active discrimination (and racism) could not be ruled out. After identifying a disproportionate distribution, then questions of whether the actions which brought about that problem were intentional, or failing that have differential effects are a sufficient condition for labeling the action as racist naturally arise. And despite the rather short-lived term of the environmental racism label, making way as it did for the broader and now accepted environmental justice, the primary and secondary questions which it inspired played a significant role in the legal development, and indeed in the flavour of the advocacy in general, of the environmental justice movement in the U.S.

Any choice in title thus carries some baggage; and the reader should note the possibility of other "loaded" terms in environmental justice research. But environmental justice term captures the essence of the problem we are addressing here, while shedding some of the questions implied by other coinage. This is not to denigrate those other paths, but is rather typical constructive criticisms enabled by the vision-correcting glasses of hindsight. Research is never a straight line and none of the directions taken in the established literature are dead ends.[23] And researching the paths already taken is the only way to

[21] Bullard, Robert D. Environmental Racism and "Invisible" Communities. *West Virginia Law Review*, 96 1994, p. 1037.

[22] Chavis Jr., Benjamin F.; Bullard, Robert D., editor Chap. Foreword to Confronting Environmental Racism: Voices from the Grassroots In Confronting Environmental Racism: Voices from the Grassroots. South End Press, 1993, p. 3; See also Evans, Jill E. Challenging the Racism in Environmental Racism: Redefining the Concept of Intent. *Arizona Law Review*, 40 1998, p. 1273.

[23] There are, however, empirical issues that must be addressed and redressed in some traditional literature before their conclusions should be cited now. For a cogent critique and check, see Noonan; Ringquist, Evan J Assessing Evidence of Environmental Inequities: A Meta-Analysis. *Journal of Policy Analysis and Management*, 24 2005; Bowen, William An Analytical Review of Environmental Justice Research: What Do We Really Know? *Environmental Management*, 29 January 2002, Nr. 1; Liu, Feng *Environmental Justice*

identify new paths. So asking a question about justice, as we do here, is an outgrowth of other questions that have hopefully steered in fruitful directions.

And to address justice, one must understand the systems which bring about injustice. As Barry notes,

> "the aggregate effect of individual acts of injustice will form part of a pattern that creates a systematically unjust distribution of rights, opportunities and resources. To offset this unjust allocation arising from individual decisions, the society's institutions need to be changed."[24]

But how to change them properly requires an understanding of the mechanics which lead to the undesirable allocation in the first place; indeed, it often requires researchers to think deeply about what exactly are the undesirable components of the system. After all, getting rid of all industry and modern production of the type which brings pollution burdens would itself bring great burdens to even more of society. As Risse remarked, "[t]he global order is not fundamentally unjust; instead, it is *incompletely* just...".[25]

Critical thinking can help research mete out the incomplete portions from the complete. This leads us first and foremost into the realm of economics. Economic science already has lent a range of tools to the environmental justice discourse, including most prominently environmental economics and econometrics. Again, the goal of the research at hand though is not to expand on these fields relative to environmental justice—although that research is undoubtedly necessary and interesting—but rather to capitalize on their still-growing conclusions in order to move motivate legal discussion of a human right to the environment. After all, examining the incomplete conclusions of earlier environmental justice work is what leads inquiry upward toward rights-based inquiries.

Although the following sections pass porously through some academic boundaries, the discussion remains bounded by the existing national and international legal forms as well as established literature as it moves downward from Chapter 2's introduction on the democratic problems motivating environmental justice research. Given that existing legal forms rely on the state-

Analysis: Theories, Methods, and Practice. Lewis Publishers, 2001.

[24] Barry, Brian *Why Social Justice Matters*. Polity Press, 2005, p. 18.

[25] Risse, Mathias De We Owe the Poor Assistance or Rectification? *Ethics and International Affairs*, 19 2005, Nr. 1, p. 10.

centric perspective research does as well. For economics, especially geographical economists, however, reduced transportation and communication costs, along with global integration, are erasing some of the absolute nature of these lines on a map.[26] Future legal research following closer on the heels of economic geography may wish to relax this stricture with the help of the economic models.[27] The established and continued importance today derives from the state's sovereign right to use and utilize their natural environment.[28] It is by exercising this right, and by extending and delegating the use of the grant, whether in part or whole, to its agencies and especially to business interests, that environmental inequity begins to propagate; whether that propagation is limited to the sovereign boundaries from which the choices emanate are however doubtful.

It is choice which begins to push against equalization, but this chapter will show that it is not only choice in the form of active discrimination, or even indirect discrimination. It is a complex interaction of choices that have yet to be fully elucidated and mapped by theory. This does not mean though that they will someday show that what we perceive at environmental justice from the work of the empirical studies of the 1990s and forward is not truly unjust. That is, there is no expectation that research will somehow explain away the painful or morally repugnant components of the way society distributes environmental quality. To the contrary, the work is making it more and more clear that environmental injustice is something to expect.

Thankfully, while the topics within the economics discipline which could be brought to bear on the environmental justice issue are copious, and there are markers already placed along the way by other researchers in the environmental justice mainstream who have reached in to economics to aide their work. Much

[26] Combes/Mayer/Thisse.

[27] Other branches of inquiry also acknowledge that boundaries are not absolute, such as those looking at the important role of multinational corporations (MNCs), non-governmental organizations (NGOs), and trans-boundary externalities. I.e. Bastmeijer, Kees/Verschuuren, Jonathan Chap. NGO-Business Collaborations and the Law: Sustainability, Limitations of Law, and the Changing Relationship between Companies and NGOs In Corporate Social Responsibility, Accountability, and Governance: Global Perspectives. Greenleaf Publishing, 2005

[28] UN G.A. Res. 3281 (XXIX) (1974). Charter of Economic Rights and Duties of the States, Article 2.1: "Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities." See also discussions in Turner, Stephen J. *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers Toward the Environment.* Kluwer, 2009, p. 10,n. 25,26

of that came in the now less-influential research from the 1990s.[29] As this more traditional economic approach ties in with the established environmental justice-canon, the path toward illustrating the proclivity of economic dynamics to undermine environmental equity begins here.

3.2 The Economics of Environmental Quality

While there may be many starting points for environmental justice, they all should pass through A.M. Freeman's 1972 article, "The Distribution of Environmental Quality".[30] This early paper linked the contemporaneous economic focus on valuing the costs of pollution[31] with the tools necessary to investigate environmental distributions. Without knowing what creates the environmental picture one sees at any given time there is no hope to create a picture that society *wants*. Freeman's article is one of, if not the, first concrete tools which could enable enable someone to investigate a perceived environmental injustice. And although the science has moved on in detail[32] this article still introduces enough of the details while staying tightly connected to the environmental justice discourse to come.

The 1970s saw the emergence of large-scale environmental economics research focused, due to policy desires, on assigning monetary figures to pollution. As the environment is not a good which is bought and sold—although notable exceptions, like the implementation of emissions permit markets like tradable sulfur credits exist—[33] economists brought a series of valuation tools to bear on the problem of finding out how much use of the un-purchased environment costs. If it was being used or utilized, it must have a value or utility,

[29] As to the waning interest in empirical environmental justice, see Walker

[30] Freeman III, A. M.; Kneese, A. V./Bower, B. T., editors Chap. Distribution of environmental quality In Environmental Quality Analysis: Theory and Method in the social sciences. The Johns Hopkins Press, 1972.

[31] The segment of environmental economics which is concerned with putting monetary figures to such goods as environmental quality which are not directly priced in the market is known as "valuation". While the field has detractors (Martinez-Alier), given the contemporary discussions on cap-and-trade carbon trading systems (in the U.S., see http://www.epa.gov/capandtrade) to water-resource rights (Glennon, Robert *Unquenchable: America's Water Crisis and What to Do About It.* Island Press, 2009) valuation remains a tool that one must contend with in environmental discussions.

[32] And Freeman has kept up with it. See Freeman III, A. Myrick *The Measurements of Environmental and Resource Values: Theory and Methods.* 2nd edition. Washington, D.C.: Resources for the Future, 2003

[33] See generally Schmalensee, Richard, et al An Interim Evaluation of Sulfur Dioxide Emissions Trading. *Journal of Economic Perspectives*, 12 Summer 1998, Nr. 3.

however implicit in the cost calculations of its utilizers. The argument was, and is, that the most logical way to put a price on the environment was to do measure its effect on economic activity.[34] This way, the environment reveals itself as an input to production[35]—whether industrial or household—whose price was always there, but previously commingled with the jumble of other costs associated with an activity.

This exercise is not just for factories who are not taking in to consideration the amount of clean air they pull into a combustion process and release as dirty air in their cost calculations; valuation can help put a value on a park or a public-use lake. The latter is often valued by travel costs calculations; better environmental quality can bring in more people willing to travel longer distances for the privilege of better quality. While humans may not purchase environmental quality directly, they do pay for goods and services which embody different levels of environmental quality. The intrinsic value of better quality is somehow reflected in the price of the traded—or traveled for—good. Valuation then is the science of getting at that "somehow."

For a useful example easily tuned to the environmental justice context, housing and land are known to have value based at least partially on their surroundings. All other things equal, a house situated in a locale with better air quality should have a higher market value than one with worse air quality. Of course, in the market for land, all things are not equal–all houses are not for sale at the same time, zoning precludes some uses of land while allowing others, contracts and deeds put limits on building characteristics in different areas, school systems differ, and even the emotional character of a neighbourhood plays a role in the housing decision. Such differences be accounted for in statistical tests, and one can then carefully extract the singular influence the environmental quality exerts on the market price. And although people may have a hard time reliably reporting how much they are willing to pay for air quality[36], the negative impact of pollution is capitalized into, and hence

[34] Anderson Jr., Robert J./Crocker, Thomas D. Air Pollution and Residential Property Values. *Urban Studies*, 8 Oct. 1971, p. 171.

[35] Krier, James E. The Pollution Problem and Legal Institutions: A Conceptual Overview. *UCLA L. Rev.* 18 1971, p. 430.

[36] Although carefully designed survey's, also known as contingent valuation methods, are another possible way to reveal hidden willingness to pay. For a general description in an environmental context, see Portney, Paul R The Contingent Valuation Debate: Why Economists Should Care. *Journal of Economic Perspectives*, 8 Fall 1994, Nr. 4; Hanemann, W. Michael Valuing the Environment Through Contingent Valuation. *The Journal of Economic Perspectives*, 8 Autumn 1994, Nr. 4; Diamond, Peter A./Hausmann, Jerry A. Contingent Val-

revealed as a portion of the price tag.

In one valuation example, notably cited as an early revelation of connections between the environmental quality and socioeconomic variables like race and income, Anderson and Crocker found that even the relatively broad pollutant measurements from the late 1960s depressed residential property prices.[37] That is, buyers are aware at some level of pollutant aspects like high particulate matter counts in the air and are willing to pay less for a house in such an area. Other studies have investigated a host of nuances and variables toward this end.[38]

Although the current research does not need to focus on nor catalogue the results of such studies[39] it may be notable to the reader to see what estimates of pollution's costs are, or were. Anderson and Crocker's results showed a \$300–\$700 (in 1971) value range for damages caused by marginal changes of $10\mu g/m^3$ of suspended particulates and $0.1mg/m^3$ of sulphates. The limited categories of air pollution measurements[40] are certainly problematic, given the many incarnations of urban air pollution, but this serves as an example of what one takes away from hedonic breakdowns of housing prices.[41] Smith

uation: Is Some Number Better than No Number? *The Journal of Economic Perspectives*, 8 Autumn 1994, Nr. 4

[37] Anderson Jr./Crocker, p. 177.

[38] Notably for the environmental justice-oriented, see Boyle, Melissa A./Kiel, Katherine A. A Survey of House Price Hedonic Studies of the Impact of Environmental Externalities. *Journal of Real Estate Literature*, 9 2001, Nr. 2; and the work of Kiel: Kiel, Katherine A./ Williams, Michael The impact of Superfund sites on local property values: Are all sites the same? *Journal of Urban Economics*, 61 January 2007, Nr. 1; Kiel, Katherine/Williams, Michael *An Analysis of the Impact of Multiple Environmental Goods on House Prices*. College of the Holy Cross, Department of Economics, March 2005 (0505). – Technical report; Kiel, Katherine A./Zabel, Jeffrey E. House Price Differentials in U.S. Cities: Household and Neighborhood Racial Effects. *Journal of Housing Economics*, 5 June 1996, Nr. 2; Kiel, Katherine A/McClain, Katherine T House Price Recovery and Stigma after a Failed Siting. *Applied Economics*, 28 November 1996, Nr. 11. Note too cases where there is no evidence of changes in housing prices with the addition of new environmental problems, such as *Hatton and Others v. United Kingdom*, application no. 36022/97, Grand Chamber judgment of 8 July 2003, at 643.

[39] Catalogues and critiques do exist, see esp. Bowen. Also Noonan; Ringquist; Liu, Chap. 3

[40] In early environmental studies there were only two pollutants examined, suspended particulates and rates of sulfation, as they were the most extensively reported at the time. Asch, Peter/Seneca, Joseph J. Some Evidence on the Distribution of Air Quality. *Land Economics*, 54 1978, Nr. 3, p. 280.

[41] Also, adding more pollution variables into hedonic regressions actually can lower the probability of obtaining usable (significant) statistics. See Smith, V. Kerry/Huang, Ju-Chin Hedonic models and air pollution: Twenty-five years and counting. *Environmental and Resource Economics*, 3 1993, cf. Kiel, Katherine *Environmental Contamination and House Values*. College of the Holy Cross, Department of Economics, January 2006 (0601). – Technical report.

and Huang also concluded in their meta-study of marginal willingness to pay studies from 1967 to 1988 that a one microgram reduction in particulates per cubic meter amounted to an average value of $109.90 (in 1982-84 dollars, although the median result was a much lower $22.40.) [42]

Arriving at these valuations of environmental damage is a technical matter known today as "hedonic pricing modeling."[43] Choices of data, spatial controls, and demographic information all must be chosen and applied carefully, but the methods borrow from strong statistics foundations. In an extremely basic rendition, housing price-data[44] makes up the dependent variable in a hedonic regressions. One then estimates the marginal implicit prices of the characteristics of a house via a carefully specialized pricing equation—the hedonic pricing equation. This equation is thus a list of the characteristics of the house; it breaks up the total price of the house or land into its composite bundles, or characteristics, in a way reminiscent of completing the transaction *a la carte*. The regression analysis then estimates the price for each characteristic as if there were truly a separate market for each: building an "a la carte" house.[45] And despite the difficulties,[46] the theory is sound and finds use in diverse valuation situations.

For example, one might estimate the marginal value—the fraction of the total price—of housing characteristics like square footage, the school system, the size of the yard, the proximity to highways for commuting, etc., as the

[42]Smith, V Kerry/Huang, Ju-Chin Can Markets Value Air Quality? A Meta-analysis of Hedonic Property Value Models. *Journal of Political Economy*, 103 February 1995, Nr. 1. Also see Smith/Huang. For more recent comments see Boyle/Kiel and Simons, Robert A./ Saginor, Jesse D. A Meta-Analysis of the Effect of Environmental Contamination and Positive Amenities on Residential Real Estate Values. *Journal of Real Estate Research*, 28 2006, Nr. 1.

[43]For a very readable and applicable introduction, see Kiel. For the classic theoretical introduction see Rosen, Sherwin Hedonic Prices and Implicit Markets: Product Differentiation in Pure Competition. *The Journal of Political Economy*, 82 January 1974, Nr. 1, as well as Griliches, Zvi *Price Indexes and Quality Change*. Cambridge, MA: Harvard University Press, 1971 and Freeman III *The Measurements of Environmental and Resource Values: Theory and Methods*.

[44]The idea to specifically use land pricing data—a readily available public source—to obtain estimates for pollution control stems from the late 1960s. See Ridker, Ronald G./ Henning, John A. The Determinants of Residential Property Values with Special Reference to Air Pollution. *The Review of Economics and Statistics*, 49 May 1967, Nr. 2, cf. Freeman III, A. Myrick Hedonic Prices, Property Values and Measuring Environmental Benefits: A Survey of the Issues. *The Scandinavian Journal of Economics*, 81 1979, Nr. 2, p. 154

[45]In a more technical phrasing, "housing units" sales prices are regressed on measures of their attributes." Bowen, William M *Environmental Justice through research-based decision making*. Garland Publishing Taylor & Francis Group, 2001, p. 196

[46]See Bowen, for discussion on when these difficulties trip up researchers. Also see Noonan, Liu, Chap. 3

composite characteristics of a given house.[47]. One can then add in "disamenities" such as the presence of a power plant,[48] or the distance removed from a Superfund[49] or other polluting sites[50] to the *a la carte* list. The statistical regression of the dependent variable—housing price—on the explanatory variables reveals parameter estimates for each included characteristic, from which one can retrieve the "price"[51] of each characteristic by differentiating the estimated price function with respect to the desired characteristic.[52]

Of course, this is not the place to learn hedonic regression techniques,[53] but rather to point out the contemporaneous socio-economic linkages with the environment already revealing themselves as environmental justice first emerged. These environmental economics calculations were part of the same academic milieu which gave the—unfortunately unconvincing—statistical support in the seminal legal case, *Bean v. Southwestern Waste Management Corporation.*[54]

These were only a few of the contemporaneous works which started explicitly acknowledging economic/environment relationships as Bullard began his work in Houston on the *Bean* case.[55] Specifically, valuation begins to show that environmental value (and utility) is distributed across the economic landscape and dependent on factors, especially pollutants. And from the economic valuation of environmental quality, moving from economic to socio-economic[56]

[47] Kiel.

[48] Blomquist, Glenn The Effect of Electric Utility Power Plant Location on Area Property Value. *Land Economics*, 50 February 1974, Nr. 1; Gamble, Hays B./Downing, Roger H. Effects of Nuclear Power Plants on Residential Property Values. *Journal of Regional Science*, 22 1982, Nr. 4; Galster, Goerge C. Nuclear power plants and residential property values: A commentary on short-run versus long-run considerations. *Journal of Regional Science*, 26 1986, Nr. 4.

[49] Kiel/Williams.

[50] Kohlhase, Janet Esty, Daniel C. The impact of toxic waste sites on housing values. *Journal of Urban Economics*, 30 July 1991, Nr. 1.

[51] This is technically the marginal implicit price

[52] In addition to the aforementioned Rosen and Kiel, see Nelson, Jon P. Residential choice, hedonic prices, and the demand for urban air quality. *Journal of Urban Economics*, 5 July 1978, Nr. 3 here for an application specific to air quality.

[53] For the interested, with the marginal implicit price, the researcher employs a second regression using the revealed price estimate as the dependent variable against demographic explanatory variables to retrieve a measure for household's inverse demand. See Freeman III *The Scandinavian Journal of Economics 81 [1979]*, p. 155-8. For a full textbook introduction, see Idem *The Measurements of Environmental and Resource Values: Theory and Methods*

[54] 482 F. Supp. 673; 1979.

[55] Bullard, Robert D. Solid Waste Sites and the Black Houston Community. *Sociological Inquiry*, 1983 In Bullard/Wright *Phylon 47 [1986]*.

[56] As seen in Asch/Seneca; Harrison Jr., David/Rubinfeld, Daniel L. The distribution of benefits from improvents in urban air quality. *Journal of Environmental Economics and Management*, 5 1978, Nr. 4; Harrison, David/Rubinfeld, Daniel L. Hedonic housing prices

quickly revealed social patterns of environmental quality, patterns which would be seen as disproportionate and injust through the work of the environmental justice-movement.

3.2.1 The Relevance of Early Valuations

Why exactly is this relevant for the study of environmental justice, a study which we hope to move in the direction of human rights? First, and before one moves in to later environmental justice studies, a warning should be heeded: Bowen notes strongly in his evaluation of the methodology of many of the foundational environmental justice studies, those studies that built off of empirical underpinnings and that form the core of many histories of the environmental justice field, that

> "[h]ad subsequent research about environmental justice followed Freeman's [1972] lead, the current body of knowledge would far more successfully stand up to a reasonable degree of scientific scrutiny."[57]

Though recently techniques have become more sophisticated and hopefully surmounted this critique[58] the codification, if not the growth, of the environmental justice "field" foundered on the hurdle of empirics. The field is now recognizing that there are multiple spatialities to the concept of environmental justice[59] and so it is unsurprising that the rather straightforward empirics of the 1990s failed to be as convincing of the problem as advocates may have hoped.

---

and demand for clean air. *Journal of Environmental Economics and Management*, 5 1978, Nr. 1; Berry, Brian J.L./Caris, Susan *The social burdens of environmental pollution: a comparative metropolitan data source*. Cambridge, MA: Ballinger Pub. Co., 1977

[57] Bowen, p. 4.

[58] E.g. Beve, C A/Brent, K M/Picou, S J Environmental justice and toxic exposure: Towards a spatial model of physical health and psychological well-being. *Social Science Research*, 36 2007; Maantay, J/Maroka, A/Hermann, C Mapping population distribution in the urban environment: The cadastral-based expert daysmetric system (CEDS). *Cartography and Geographic Information Systems*, 34 2007; Fisher, Joshua B./Kelly, Maggi/Romm, Jeff Scales of Environmental Justice: Combining GIS and spatial analysis for air toxics in West Oakland, California. *Health and Place*, 12 December 2006, Nr. 4; Mennis, Jeremy L. The Distribution of Enforcement of Air Polluting Facilities in New Jersey. *The Professional Geographer*, 57 August 2005, Nr. 3; Mennis, Jeremy Using Geographical Information Systems to Create and Analyze Statistical Surfaces of Populations and Risk for Environmental Justice Analysis. *Social Science Quarterly*, 83 March 2002, Nr. 1; Liu

[59] Holifield/Porter/Walker; Walker.

This is one reason why a discussion of the roots of environmental justice relative to econometrics studies are of interest within a study that does not profess to be a chronology or history of the field; one need not wade into the extant empirical debate in order to build new research. One must, however, understand what techniques other researchers are using now to (re)build an empirical picture of environmental justice. But the substantive reason is to begin to paint the picture of how naturally value of environmental quality distributes itself across space. Research need not even take into consideration what polluting sources are around an area to perform estimates of their burden; people already put some degree of value on the (dis)amenities.

From finding evidence of a distribution of value, with some of that valuable tied to the environment's quality, it is not a big leap to show that the environment will have differential impacts on different classes of people. The environmental justice hypothesis, and substantive problem, emerges naturally then when one links the ability to show a distributed environment with the concerns of that distribution being skewed toward a minority of the populace. The point for the human rights scholar is that one whole branch of statistical work, which both predates the idea of environmental justice and continues to be used today[60] relies on and confirms the variations in value across a geographical space of environmental quality. In so framing the discussion, environmental distributions are simply described and not yet termed equitable, unfair, or unjust. Yet there is a clear "theoretical expectation that environmental quality will be positively associated with wealth or income"[61]; the lower the income, the lower the ability to purchase environmental quality. Income distributions are related to other socioeconomic variables which concern the environmental justice movement, including race.[62] Whatever the mechanisms which come to work on the spatial area to create that valuation distribution, those with less resources will be expected, on average, to have less quality. In Freeman's particular study, the average black family, regardless

[60] For recent textbook treatments of environmental valuation see Haab, Timothy C./ McConnell, Kenneth E. *Valuing Environmental and Natural Resources: The Economics of Non-Market Valuation*. Edward Elgar, 2002

[61] Bowen, p. 13;also Jaffe, Seth D. The Market's Response to Environmental Inequity: We have the solution; what's the problem? *Virginia Environmental Law Journal*, 14 1995

[62] Downey, Liam Environmental Injustice: Is race or income a better predictor? *Social Science Quarterly*, 79 December 1998, Nr. 4; Mohai, Paul/Bryant, Bunyan Environmental Justice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards. *U. Colo. L. Rev.* 63 1992. Also Wilkinson, Richard *Mind the Gap: Hierarchies, Health, and Human Evolution*. New Haven: Yale University Press, 2000

of city, had higher exposures than the average family, of any race, who had income greater than $3000, approximately the then-poverty threshold for a family.[63] This strong distributional result marks a major fork in the road between environmental economics and environmental justice, although one that would become visible only in hindsight. It is this expectation that begins to motivate the moral core of environmental justice, engaging the feeling that there is something unfair, and potentially discriminatory, with environmental quality.

Before moving on, a final point is in order relevant to the development of remunerative policy. It is not entirely straightforward to put hedonic pricing models to work rectifying environmental justice. There are problems in the utilization of hedonic pricing models to guide policy, especially policy based on cost/benefit analysis and aimed at rectifying poor environmental area. Because the techniques for valuing non-market goods naturally rely on extracting that information presumed to be commingled within market choices, then accepting any valuation figure achieved through observing market choices is also an acceptance of the underlying income distribution.[64] As the poor naturally have less market activity, the measured, economically- visible, effect will likely—to the extent that lower income groups have less market activity, that affects the revealed measured stemming from market activity—be smaller.

Similarly, there are non-observed damages.[65] Health effects can be so minimal as to only manifest themselves over many years,[66] and damage can accumulate to non-human sources or to public buildings not included in the measurements of market activity directed toward, for example, residential houses. Thus, some human damage of environmental problems lie below the threshold of perception needed to change behavior or external to the relevant proxy-market activity. Behavior which does not change with environmental damages will therefore not manifest itself in consumption patterns, and hence not in market-based statistical approaches to finding the value. If the different levels of environmental damage are too small to perceive between two houses, then buyers also cannot record any preference for environmental quality by paying

[63] Freeman III, p. 264. For Historical poverty tables see the U.S. Census Bureau at http://www.census.gov/hhes/www/poverty/histofpovmeas.html, Last accessed March. 18, 2010.

[64] Ibid., p. 248.

[65] Ibid.

[66] See discussions on latency in Chapter 2.

more for houses in imperceptibly better areas.[67]

The market-power effect is opposite for benefits accruing to higher-income individuals with more market activity. To some extent, the problem of higher-income individuals' choices coming through louder in valuation work can be avoided by concentrating on the effects to average incomes; using averages inflates the estimates of benefits to those in lower income brackets and deflates estimates of those in higher brackets. The downside though is that averages blur the ability to decide who exactly something is owed to, or required from.

Both criticisms point to a problem of measuring the costs of pollution, and the problems grow on the lower income area of the spectrum. Given that research finds income inequality to be a problem in and of itself, with many of the same problems as environmental justice but without reference to environmental or spatial inequalities[68] developing a politically feasible regulatory policy to either prevent or fix the situation is complicated. These are hurdles, not entirely impossible to overcome. As the problems of environmental justice expand though, broadening beyond the mapping of environmental burdens, as sociological research is now angled[69] it becomes more complicated to design a policy which could cut-off environmental injustices via regulations based only on valuations of environmental quality.[70] And, perhaps most critically, siting

[67] This is the hypothesis stated in Anderson Jr./Crocker.

[68] See Wilkinson; Wilkinson, Richard D. *Unhealth Societies: The affliction of inequality.* Routledge, 1996.

[69] Walker.

[70] There is an implicit moral problem here too; is correct to compensate, in any fashion, those exposed to worse environmental risks than others? See Been, Vicki Compensated Siting Proposals: Is It Time to Pay Attention? *Fordham Urb. L.J.* 21 1994. Also note anecdotes such as that from Robbins, Illinois, in Lambert, Thomas A. The Case Against Private Disparate Impact Suits. *Ga. L. Rev.* 34 2000, p. 1180, n.84, discussing how a compensated siting, accepted by the town for a financial boost, fell flat when state legislation, external to the decision, changed. Indirect compensation is even less plausible, such as job creation or indirect economic benefits. As Schreder-Frechette shows, there is little evidence that any sort of compensation currently trickles down to burdened groups. Schrader-Frechette, Kristin Human Rights and Duties to Alleviate Environmental Injustice: The Domestic Case. *Journal of Human Rights*, 6 2007, p. 121.

> "Victims do not appear to have more democratic or human-rights opportunities, especially since earlier statistics show that US quality of life is about 66 percent of what it was 25 years ago. All but the top 20 percent of wealthiest Americans are economically relatively worse off, in the early 21st century, than they were a quarter-century ago. This increasing economic inequality has made it harder for most citizens to fulfill their human rights, equal opportunity, and democratic participation in government."

Even above a lack of evidence of benefits of compensation it is hard to argue that burdened groups have consented to living with all of the conditions that impinge upon them. Further to the contrary, evidence shows that even their choices of location to live are condensed by

itself is still dealt with as an individual project, detached from any comprehensive whole of urban, suburban, rural, or other units of spatial aggregation.[71] Designing a system of siting based on valuations models does not address the issue of what unit is proper for total planning. As such, the potential for clustering still looms even though each individual site may pass muster as fair on smaller scales.

While none of this is to say that empirically-based regulation could not solve the environmental justice dilemma, it does suggest that the least contentious way for environmental justice to utilize the conclusions of hedonic valuation is as a confirmation that the interaction of economics and environment separates environmental quality. Different places in the economic landscape will have different values of the environment imputed into usage. The following sections confirms the distributed view, and goes the "environmental justice-step" further to illustrate that burdens tend toward the lower income classes and/or minorities.

3.3 Early Evidence of Uneven Environments

While hedonic valuations of environmental quality made their debut in economics fora, their applicability to what we now recognize as environmental justice is unmistakeable. The valuation literature continued on its own path, making valuable contributions to emerging nationwide environmental policy, while several new studies[72] clearly marked where concerns about environmental distributions diverted in focus.

To be sure, evidence of environmental injustice was already turning up in government reports.[73] The Kruvant report, published as part of an in-depth study of energy use and pollution commissioned by the Ford Foundation in 1975, explored graphically the air quality distribution in Washington D.C.[74]

a lack of options. Schrader-Frechette, p. 122.

[71] Davy, Benjamin *Essential Justice: When Legal Institutions Cannot Resolve Environmental and Land Use Disputes*. Springer, 1997, p. 51.

[72] See Kruvant, William Chap. People, Energy, and Pollution In The American Energy Consumer. The Ford Foundation, 1975; Berry/Caris; Asch/Seneca; Harrison Jr./Rubinfeld; Gianessi, Leonard P/Peskin, Henry M/Wolff, Edward The Distributional Effects of Uniform Air Pollution Policy in the United States. *The Quarterly Journal of Economics*, 93 May 1979, Nr. 2.

[73] Council on Environmental Quality, editor *The Second Annual Report of the Council on Environmental Quality*. Council on Environmental Quality, 1971.

[74] Newman, Dorothy K./Day, Dawn *The American Energy Consumer: A Report to the*

In addition to reinforcing the correlations between income, race, and pollution, the study also found that the effected groups also are those who produce the least of the pollution.[75] The strong relationship between income, race, and fuel and energy consumption explored in other chapters of the report strongly implied that the disadvantaged populations are receiving the costs and less of the benefits.[76]

However, as McCaull[77] emphasizes, causality appears to stem from low socioeconomic status toward the probability of living in a poor environment, but the relationship is not fixed. A prominent example appears in the Kruvant study[78] where some of poorest *and* many members of the U.S. Congress live in the same areas of the worst D.C. air quality.[79] The picture the study paints is one both supporting economic theory, being the first of many environmental justice studies showing this proclivity towards accumulating burdens with lower incomes, and providing cautioning against broad conclusions.

Berry[80] elaborated on the conclusions of the Kruvant study in a more detailed breakdown with expanded pollutant indices. That study found it was indeed more probable to find the "minority poor" exposed to higher pollution levels in locations where the overall pollution levels themselves are low. However, it also revealed some non-standard dynamics; that is, dynamics not readily seen under basic economic models. It appeared that cities with higher *absolute* pollution levels seem to drive the highest income earners out of the

Energy Policy Project of the Ford Foundation. The Ford Foundation, 1975.

[75] Kruvant, p. 166. The study also cites evidence for similar patterns of distributions among residents in New York City, Chicago, Denver, Los Angeles and San Francisco ibid., p. 149. Further evidence comes cited from other contemporary studies of distributions including: Jeffrey Zupan's investigation of the New York city area which found much less exposure to CO and hydrocarbons in higher tax brackets, although middle and low income brackets were exposed equally Zupan, Jeffrey M. *The Distribution of Air Quality in the New York Region*. Baltimore, MD: Johns Hopkins University Press, 1973; The Argonne National Laboratory's computer simulation model for the Chicago area also found a correlation with income and sulphur dioxide. cf. Kruvant also see Lavelle, M./Coyle, M. Unequal Protection: The racial divide in environmental law. *The National Law Journal*, 21 1992, p. S6

[76] see McCaull, Julian Discriminatory Air Pollution: If The Poor Don't Breathe. *Environment*, 18 March 1976, p. 31 and Newman/Day, p. 87-214

[77] McCaull, p. 27.

[78] Kruvant.

[79] Across the Ocean, Laurian found that in France, high household income locations have more hazardous waste sites than poorer towns. She postulates "[i]t is possible that incomes are higher in larger cities that also have numerous sites and/or previously industrialized towns that have been able to convert their economic bases and maintain their income levels." She makes the note that one must account for the independent effects of income when trying to explain hazardous waste siting. Laurian, Lucie Environmental injustice in France. *Journal of Environmental Planning and Management*, 51 2008, p. 69.

[80] Berry/Caris.

city—perhaps to suburbia— leaving more room for the middle class in better quality regions and therefore also more space for the lower classes to distribute among the remaining lower pollution locations.[81] While this dynamic is hard to predict a priori, it does still rest under dynamics that fit better with geographical and urban economics.[82] They are important to consider given the emphasis environmental justice studies place on changing the status quo.

Consider as an illuminating and prescient story how the various levels of government were forced to act to actively desegregate schools even though the "white flight" from those schools might re-create conditions approaching the original segregated situation.[83] Findings like those of Berry[84] are important because they emphasize the need for more elaborate general equilibrium models, including not just urban agglomerations but also reactions in surrounding areas, lest fixing the problem become only temporary.

Berry's[85] research also found similar mechanisms functioning when analyzing the distribution of noise and solid waste pollution. The confluence of burdens led this study to summarize that

> "...the problems of the inner-city poor are overdetermined; a cure for one of two of the symptoms still leaves enough others to contain and absorb the likely benefits of having one or two symptoms cured."[86]

Given the primary correlation of pollution and income, those with the highest exposure therefore tend to be disadvantaged groups, being as they are those with lower incomes. Combined with Freeman's results that income is negatively correlated with environmental quality and the benefits of environmental improvements accrue to those with the highest exposure to the measured environmental burden one really starts to see the modern environmental justice concern.[87]

Conscious though of the limits of descriptive analysis, Asch and Seneca[88]—often cited as one of the first targeted environmental justice studies—make

[81] Berry/Caris, p. 587.
[82] Section 3.4
[83] Been *Cornell Law Review 78 [1993]*, p. 1024, n. 119. Specifically, United States v. Scotland Neck City Board of Education, 407 U.S. 484, 491 (1972).
[84] Berry/Caris.
[85] Ibid.
[86] Ibid., p. 587-8.
[87] Freeman III, p. 264-6.
[88] Asch/Seneca.

a slightly more limited, general claim regarding overall distributions of environmental quality. They found that cities with more *poverty characteristics*—higher percentages of the population below poverty measures like income level, income distribution and the poverty tail of the overall distribution—expose their citizens to higher particulate concentrations.Their data set was much broader than earlier studies, analyzing more cities in more states, but the authors were quick to caution that analysis at the city level is large on the aggregation scale and obscures potentially significant distributions within the city.

Further scrutiny of a subset of the cities yielded weaker relationships between the environment and demographics, especially with regard to racial categories. As they drilled down into the aggregate demographic data, however, aiming for more clarity in smaller spatial areas, the correlation did reappear.[89]The connection between race, as opposed to only income, and environment and was even more pronounced in their final disaggregation to personal exposure data.[90]

Although this is one of the first studies to scrutinize the racial aspect of environmental quality specifically, it is equally important to notice the aberrations between levels of data aggregation. This technicality comes in to play when environmental justice moved from descriptive investigations to legal advocacy. Had the researchers here not examined several levels of data, the study's use could have been very different. The cursory inspection given should not though be taken as casting doubt on the correlation of poor environments and race, or implying that all such relations found are statistically spurious. Rather, the authors' own caution should spur further investigation to clarify the delicate correlations. The aberrations, indicative of the complexities involved in distilling complex relationships from available data, certainly add some empirical motivation.[91] Furthermore, *any* consistency in their limited claim that low-income characteristics signal higher pollution burdens over a nationwide sample is remarkable, especially given the substantial probability

[89]For a more detailed discussion on choices of data and hedonic pricing models, see Shultz, Steven D./King, David A. The Use of Census Data for Hedonic Price Estimates of Open-Space Amenities and Land Use. *The Journal of Real Estate Finance and Economics*, 22 2001, Nr. 2-3.

[90]Asch/Seneca, p. 285.

[91]For instance, Bowen (p. 5 2002) notes the results would be more compelling if the examined sites had been sampled at random instead of selected. Also note criticisms of non-neutral sampling in Noonan.

for data problems to obscure such a connection.[92]

While a discussion extending the hedonic models will have to wait until Section 3.4, policy advocates did not themselves wait to aim to make changes. Freeman concluded by noting

> "that the problem is not so much finding out more about the equity implications of possible policy alternatives, but getting the political system to come to grips with them and resolve them."[93]

That certainly has been one of the goals of the environmental justice movement in the decades since his writing and is reflected in the directions taken by advocates. On the way, however, society and the political machinery have hit on other hurdles, which came up as advocates pushed for policy changes. Justice of the social type usually requires urgency, and political systems are not known for such rapid action.[94] And while some blame for the lack of forward motion certainly lies here, there is a certain lacking in the cumulative force, if not the descriptive nature, of the mainstream environmental justice research.

3.3.1 From Evidence to Action

Although they were not, in the main, successful in sparking new policy initiatives, the early work that moved quickly into the justice realms of inquiry did add a lot of information as to the connection between distributions and lower income and socioeconomic classes. So while there was still work to be done solidifying the valuations and linkages explored above, advocacy moved quickly toward change. The landmark case of Bean v. Southwest Management, followed by the research and tenacious advocacy of Dr. Robert D. Bullard transformed the erstwhile environmental justice-inquiry into movement.[95]

[92] Asch/Seneca, p. 283.

[93] Freeman III, p. 277.

[94] Huitema, Dave *Hazardous Decisions: Hazardous Waste Siting in the UK, The Netherlands, and Canada. Institutions and Discussions.* Dordrecht: Kluwer Academic Publishers, 2002, p. 9. Further the average citizen has a limited ability to understand science; although this is not as limited as some have inferred. ibid., p. 9,302,379.

[95] This work will not catalogue the events, philosophical or substantive, which led to the environmental justice movement. The emergence of environmental justiceś philosophical grounds as well as its movement proper are the subject of their own academic inquiry. See Yang, Tseming The Form and Substance of Environmental Justice: The Challenge of Title VI of the Civil Rights Act of 1964 for Environmental Regulation. *B.C. Envtl. Aff. L Rev.* 29 2002; Davies, Lincoln L. Lessons for an Endangered Movement: What A Historical

A large, lingering, and abhorrent problem in the U.S. is racism. Despite great strides to combat the history, institutionalized and unconscious racism remains.[96] The fight for equality goes on and some of that fight spilled over in to the environmental matters which we now know as environmental justice. This case and its progeny dug deeply into illustrating the connection between a distributed environment and its tendency toward impacting most detrimentally a class in the U.S. that has always been burdened.

The question asked in *Bean v. Southwestern Waste Management Corporation*[97] was whether environmental distributions could themselves be racist? And if so, can racist environmental policies be corrected through established anti-discrimination legal pathways? If so, the connection of environmental policies and their outcomes to the already well-traveled legal protections against discrimination could be a powerful tool toward rectification.

The connection between poor environments and disadvantaged groups had already been shown in several studies by the late 1970s, when the Southwestern Waste Management Corp (SWW) applied for a permit to open a landfill in a Houston, Texas neighborhood. But was their choice of location steered by an intentional drive? The hurdle, and the untested legal road of Bean v. SWW, was to show that policy indeed fomented a racist outcome in distributing environmental quality. The case became a milestone because in pursuing this legal path, it gave the concept of unequal environmental distribution its first name: environmental racism. The suit also gave environmental justice a birthplace—Houston, Texas—which would provide unfortunately but ample nourishment for the fledgling movement.[98]

Juxtaposition of the Legal Response to Civil Rights and Environmentalism has to Teach Environmentalists Today. *Envtl. L.* 31 2001. Further, while both *Bean* and the PCB facility siting can be pointed to as the beginning of the environmental justice *movement* there are many other substantive events that could lay claim. Given the strong rights focus of both the later legal components to the movement as well as the topics explored herein, one should mention the connection with the United Farm Workers' Union's fight against pesticides and the conditions of black garbage collectors as publicized by Dr. Martin Luther King Jr. in the 1960s. Such was the first environmental law suit to utilize civil rights statutes in 1979.

[96] See esp. as an introduction, Lawrence III, Charles R. The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism. *Stanford Law Review*, 39 1987; and the recent revision Lawrence III, Charles Unconscious Racism Revisited: Reflections on the Impact and Origins of the Id, the Ego, and Equal Protection. *Conn. L. Rev.* 40 2008

[97] 482 F. Supp. 673; 1979 U.S. Dist. LEXIS 7827, *aff'd mem.*, 782 F.2d 1038 (5th Cir. 1986)

[98] E.g. Bullard, Robert D. *Dumping in Dixie: Race, class and environmental quality.* Boulder: Westview Press, 1990; Idem Endangered Environs: The Price of Unplanned Growth in Boomtown Houston. *California Sociologist*, 7 1984, Nr. Summer; Idem *Socio-*

Despite the long history of civil rights and the legislation in place to prevent active racism in the U.S., the legal roads explored by the *Bean* case are accessible only by leaping a high hurdle—proving racist *intent*. A policy which effects discriminatory outcomes does not trigger the United State's equal protection clauses unless the discrimination can be shown to be intentional. This controversial interpretation rests largely upon the black-letter case of Washington v. Davis,[99] and also on the Village of Arlington Heights v. Metropolitan Housing Development.[100] Since their inception, especially with regard to *Davis*, the U.S. courts have been critically testing many discriminatory situations, and the controversy among interpretations continues today.[101]

The case began in 1979 when the Texas Department of Health granted a permit to allow SWW to open a Type I solid waste facility[102] on the outskirts of Houston. The plaintiffs asserted that the approval of the permit for this particular location was "...at least in part, motivated by racial discrimination in violation of 42 U.S.C. §1983 (Section 1983) and seek an order revoking the permit."[103]

The site, already under construction as the case came to trial, is only 1700 feet (518 meters) from a predominantly minority high school. The high school, which is adjacent to a residential neighbourhood, had no air conditioning to offset the potential odours and airbourne material. The plaintiffs asserted

logical Inquiry 53 [1983]. See also Krieg, Eric J A Socio-Historical Interpretation of Toxic Waste Sites: The Case of Greater Boston. *American Journal of Economics and Sociology*, 54 1995, Nr. 1 for a similar, contemporaneous methodology and outcome for Boston.

[99] 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976) See text herein.

[100] 429 U.S. 252; 97 S. Ct. 555; 50 L. Ed. 2d 450; 1977 U.S. LEXIS 28

[101] Rakoff, Todd Washington v. Davis and the Objective Theory of Contracts. *Harv. C.R.-C.L. L. Rev.* 29 1994.

[102] In Texas, a Type I landfill is the 'standard landfill for disposal of MSW [Municipal Solid Waste].' Texas Administrative Code, Title 30, Part 1, Chapter 330, Subchapter A, §330.5

[103] *Bean* at 675. Under Title 42, Chapter 21, Subchapter 1 §1983,

> "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

See infra Section 5.3.3.

that these characteristics made the siting questionable for a landfill. Despite the problems with the location, the facility complied with the boundaries of the applicable permits and hence was duly approved. It was, after all, the municipality's job only to review the application brought to them by SWW.

This is an important point, given the hurdle of intent, as it is sometimes construed that municipalities themselves decide when and where to open landfills and waste treatment. Although access to landfill services can be provided by taxes, the waste companies and landfills are not, in general, state businesses. There are limited cases where towns can announce that they are interested in hosting a facility, given a known need in the area.[104]

In the United States, it is easier to see landfills and waste treatment facilities as factories like any other productive industry. Instead of making money by producing goods or services for consumption, they make their money by accepting the waste goods of others. Therefore, a new landfill permit is applied for by the company in much the same way that a building permit is applied for by a traditional company opening a new factory. And just as a traditional factory which complies with all local regulations will receive a permit to operate, the application by SWW to begin a landfill was approved. The thrust of the plaintiffs' case then was to show that the permitting choice itself was discriminatory. Filing for injunctive relief via Section 1983, although not providing explicit rights in itself, serves to link the permitting process to the discriminatory prevention clauses in the U.S. Constitution.[105] The legal reasoning—and logic behind many subsequent cases—was to show that the action of permitting itself was *purposefully* discriminatory, thus depriving them of rights guaranteed by the Constitution via intentional action.[106]

Because the route to the constitutional right was initiated through a request for injunction, the plaintiffs' had to establish four prerequisites. The court agreed that the effects of the permitting supported three of the four: substantial threat of irreparable injury;[107] injury outweighing the harm an in-

[104]Lambert, Thomas/Boerner, Christopher Environmental Inequity: Economic Causes, Economic Solutions. *Yale Journal on Regulation*, 14 1997, p. 217-18, telling the story of Robbins, Illinois, south of Chicago. Also see Gover, Kevin/Walker, Jana L. Escaping Environmental Paternalism: One Tribe's Approach to Developing a Commercial Waste Disposal Project in Indian Country. *U. Colo. L. Rev.* 63 1992 discussing the desirability of establishing of a waste disposal facility on a native American reservation.

[105]U.S. Constitution amend. XIV, §1.

[106]A more thorough treatment of this important legal path and legislation is below.

[107]citing Henry v. Greenville Airport Commission 284 F.2d 631 (4th Cir. 1960) and Ethridge v. Rhodes, 268 F. Supp. 83 88-89 (S.D.Ohio, E.D. 1967), which held that a

junction puts onto the defendants;[108] and the injunction will not dis-serve the public interest.[109] The fourth prerequisite, supporting a substantial likelihood of success under the merits of Section 1983, was however blocked by the hurdle to show a discriminatory *intent*.[110]

The court held the interpretation that proving discriminatory purpose is to be measured against the aforementioned two black-letter cases of *Davis* and *Arlington Heights*. These two cases spelled out the need to prove a purpose, or intent, behind the discrimination. That is, the action must be proven to be racist in intent and not only outcome. There was no disputing the fact that the waste facility would impact the largely minority neighbourhood into which it was placed more than any majority-inhabited areas. Proving, at least in a legal sense, requires a wealth of evidence to bolster a theory in the face of critiques, knowing full well than only one criticism passing through the theory spells its downfall. The burden of proof laying, as it does here, on the accuser, is rather large in volume alone. More damagingly, the necessary proof is often laying in the hands of the defendants, completely out of reach of the plaintiffs.[111]

The best case scenario for the plaintiff looking to surmount the intent hurdle in a discrimination case is to have a "smoking gun':' a piece of clear evidence showing the decision was racially motivated. Perhaps a committee transcript or a phone conversation can show the purpose behind the decision was indeed to discriminate. But such evidence is rare. More often, a plaintiff will attempt to establish a body of persuasive evidence. Sometimes this can take on a statistical component. The ability of a plaintiff to establish substantial statistical evidence making it clear, in absence of a smoking gun, that there *must have been* a racist gunman has its own legal history.

---

deprivation of constitutional rights can itself be an irreparable injury. The prerequisite was aided by the fact that damages would not compensate for the lasting impact on land values and health and safety, *Bean* at 677.

[108] ibid

[109] ibid

[110] The intent hurdle is central to a large body of environmental justice literature. Notable in this early context, and to illustrate its centrality, the 1994 Public Health Equity Act, as amended by Senator Paul Wellstone and mentioned above in Chapter 1, would have allowed demonstration of disparate impacts to be sufficient to demonstrate discrimination in cases involving federal environmental agencies. This would remove the "intent" hurdle stumbled over many times by environmental justice court battles. cf. Boerner, Christopher/Lambert, Thomas Environmental Injustice. *Public Interest*, 118 1995, p. 73.

[111] Note After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement. *Harv. L. Rev.* 116 2003, p. 1784.

3.3.2 The Statistical Hurdle of Intent

Two early U.S. cases, *Yick Wo v. Hopkins*[112] and *Gomillion v. Lightfoot*[113] set the bar for inferring from numerical rationale an intent to discriminate. The breakthrough, in terms of civil rights litigation, was to establish that a law, which was written in non-discriminatory language could nevertheless be applied in an arbitrary and discriminatory manner, and thus could be held unconstitutional because of infringement of rights granted by the Fourteenth Amendment.

In *Yick Wo*, the enforcement of a laundry permitting process granted no permits to facilities belonging to Chinese laundry proprietors, and only one other non-Chinese facility, although there were no differences between the Chinese-owned facilities denied and the non-Chinese-owned facilities which obtained permits. Due to the entirely selective exclusion of the Chinese facilities, and the lack of intervening explanatory characteristics, the court inferred an intent to discriminate. *Gomillion v. Lightfoot* established that a redrawing of an electoral district's boundaries, although within the powers of the state, violated the 15th Amendment rights of the black voters which it effectively excluded. The redistricting changed the shape of the city of Tuskegee, Alabama, from a square to a (highly) irregular 28-sided polygon which removed nearly all black citizens from the city's electorate, but did not remove any white voters. The court found that, although there was no direct proof of racist intent within the political choices, the effect was such that the choice itself could only have come from a racist animus.

These early cases set the stage to allow for statistical evidence to serve as proof of discriminatory intent.[114] The plaintiffs relied on the weight of the numbers to support the inference that no other reason, except for a racist motive, could explain the outcomes. The connection in these cases were rather strong. In both, the minority excluded from their constitutional rights was at, or nearly 100%. Such a near-perfect exclusion could only, the courts found, stem from a discriminatory intent, as no non-discriminatory reason could account for the statistical facts. As set down in *Yick Wo* and *Gomillion* then the interpretation of intent has a distinct temporally correlated aspect between

[112] 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).
[113] 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960).
[114] See also, more recently *Personnel Administrator of Massachusetts et al.v. Feeney*, 442 U.S. 256 (1979).

decisions and patterns. First there was a primary pattern or distribution, then a decision, and following that the pattern changed. The new pattern reflected statistical evidence of discrimination.

The perverse effect of these victories, however, is that the hurdle for proving racial discrimination through numbers was set very high. It remains so in today's cases, despite the intervening decades' lack of success in rooting out remaining corners of discrimination in U.S. society. *Bean vs. Southwestern Management Corp.* was not nearly so clear cut. Although, like the *Yick Wo* and *Gomillion* cases, the surface evidence raised civil rights issues, the underlying statistical connections were less absolute and their case was eventually lost on these grounds. Such problems illustrated proving discriminatory intent via statistical evidence reappear often in environmental justice cases. It is far easier to show a discriminatory effect—that the outcome of a policy reveals a pattern of discrimination—than it is to show discriminatory intent.

In the *Bean* case, in particular, and following the *Arlington Heights* case, the plaintiffs noted that the same potential site was surveyed but denied a permit in 1971. The intervening years only saw the site become more populated by minorities. The historical picture was not sufficient to serve as a pattern or inference of discrimination, however. But, although this single fact did not convince the court or point to a smoking gun of intentional discrimination, it did persuade the court to note that "if [they] were TDH [Texas Department of Health], [they] might very well have denied this permit."[115] There is, however, more evidence not shown in the case tha is even more disturbing. Of the five garbage incinerators located in the city from 1920 through 1975—a period of time where the city itself maintained the facilities—four were located in predominately black areas and the fifth was in a Hispanic area.[116] In a later, short-lived, 'mini-incinerator' project, two of the three test sites landed in minority neighborhoods.[117] Furthermore, all five city-owned landfills were in black neighborhoods.

The state of Texas also did not appear to be even-handed in the permitting process which it oversaw from 1970-78. The Texas Department of Health allowed permits for eleven solid waste sites in black neighborhoods out of the twenty-one total sites.[118] The 54.2 percent of new permits is a distinct

[115] *Bean* at 679.
[116] Bullard *Sociological Inquiry 53 [1983]*, p. 277-78.
[117] Ibid., p. 278.
[118] Ibid., p. 281.

contrast to the 26-27.6% black population. Perhaps even more damaging is the evidence that two largely white locales adjacent to Houston proper had also located their landfills in the black neighborhood of Riceville, which notably did not have universal garbage collection, paved streets, or running water.[119] And such types of evidence as to an organized pattern of siting extends to solid waste disposal sites and their proximity to other Houston schools. In addition to the landfill in the Bean v. SWW, Bullard reported that of the 47 schools in proximity[120] to the new landfills, 66% were predominately black schools.[121].

Despite this collection of evidence, *Bean* failed to show that the Texas Department of Health's approval of the permit was consistent with some previous pattern of discrimination. There was a very clear line between race and outcome in the two blackletter cases but here, 58.8% of the sites already permitted were in census tracts with less than a 25% minority population. That is, over half of the landfills sat in census tracts with a lower minority populations than even the plaintiffs' definition of what constitutes a Houston-area minority tract: a minimum 39.3% minority population.[122] Furthermore, a cumulative picture of census tracks with 50% or less minority would have encompassed 82.5% of all their permitted sites in the area.[123] The collective weight of the historical story of waste siting in Houston and the specific statistics simply did not reach the *Yick Wo* and *Gomillion* standards.

Other statistics were available and put forth in court as well. The plaintiffs divided the city into quadrants and looked for patterns of siting. In this case, 53.3% of Houston's white population lived in the southwest quadrant, accompanied by only 17.1% of the solid waste sites. Similarly, directly north in the northwest quadrant were an additional 20.1% of the white population but only 15.3% of the landfills. The math means that the west half of the city carries 73.4% of the majority population, but a mere 32.4% of the trash, leaving the eastern half, with 61.5% of the minority population encumbered by 67.6% of the waste. The data here appear to show a discriminatory pattern.

However, there are other patterns obscured in this larger spatial level of analysis that are not intentionally discriminatory. For instance, there may be

[119] Bullard *Sociological Inquiry 53 [1983]*, p. 281.
[120] Here again, a definition of spatial variables is missing.
[121] Ibid., p. 285.
[122] Moving up a level in spatial aggregate unfortunately reveals an adjacent area with only a 18.4% minority population, so the focus was not too tight here.
[123] *Bean* at 677.

underlying systematic discrimination in housing issues which in turn lead to minorities clustering in the industrial sectors. Drilling down into these quadrants reveals that the eastern half of the city contains a dominant amount of the industrial sectors, including the city's shipping district. Taking the finer details that more waste is already probable in industrial areas into consideration makes the larger spatial pattern murkier, and the direct link between siting and race seems less substantial. This illustrates the point being made recently that spatial agglomeration, like an industrial district, must be taken in to consideration lest empirical tests bias the individual variables.[124] The numbers simply did not convince the court. The critical question of what statistical level would, however, convince the court in this situation remained (and largely remains) unanswered.

Also left unanswered is the question of what material in an environmental justice context would count as *Yick Wo* and *Gomillion* type proof? Another often cited case, *East Bibb Twiggs Neighborhood Assoc. v. Macon-Bibb County Planning & Zoning Commission*[125] also failed to prove statistical evidence of racial intent or a pattern of racially-tied siting. The landfill in questions under that case had only one other census tract's landfill to compare with, leaving little data to work with. The court noted that "while the [Macon-Bibb County Planning & Zoning] Commission's decision to approve the landfill for location in census tract ... does of necessity impact to a somewhat larger degree upon the majority population therein, that decision fails to establish a clear pattern of racially motivated decisions." Steering away from a reading of intent was also the aforementioned fact that municipalities do not actively solicit landfill applications but rather reviews applications from third party facilities who wish to establish a landfill. This fact further removes the town planning board from assertions of racial animus.

These were the first two cases to try and link a perception of disproportionately partitioned environment with the law. Economics predicts that environmental distributions will occur, and related research adds the conclusion that it is the poorer areas that will experience poorer environs. It was these first cases which took that information in the discrimination direction, in the hopes of changing the status quo, by moving to show that its not only a cumulative economic system which pushes that outcome, but active choices by

[124] Bowen/Atlas/Lee. Also see Section 3.4.
[125] 706 F. Supp. 880 (1989).

regulators. And while there were several concrete criticisms which could have increased the plaintiffs' chances[126] the outcome is not likely to change in the many similar cases, given the apparently high hurdle of establishing intent.

This particular problem is prevalent in environmental justice cases, generating a substantial subsection of literature,[127] and lends itself to a physical analogy. The trade-off between resolution power—in the sense of looking at an area or spatial relationship under a 'legal microscope'—and the ability to view a pattern supposedly stemming from the intrinsic relationship, is that increasing the magnification to detail the inner workings simultaneously removes the ability for the viewer to show an overlying pattern. The more tightly one

[126]For instance, census tracks are often larger than the group research is focused on. Goodman, Allen C. A Comparison of Block Group and Census Tract Data in a Hedonic Housing Price Model. *Land Economics*, 53 November 1977, Nr. 4 One misses a potential correlation between minorities and permitted sites if the sites are clustered in black neighborhoods, but the larger census tract demographic does not identify the tract as predominantly minority. Similarly, even if one identifies the tract as impacted, the addition of data from non-affected individuals in the larger census tract area can be "improperly folded into the statistical data." Worsham, Julia B. Latham Disparate Impact Lawsuits Under Title VI, Section 602: Can A Legal Tool Build Environmental Justice? *B.C. Envtl. Aff. L. Rev*, 27 2000, p. 690. Examining data on a case-by-case basis, noticing that a predominantly white census tract's two environmental hazards are clustered in the two minority communities or subdivisions is relatively easy. Dealing with only the census tract level data, however, can easily obscure this micro-relationship. Examining smaller data scales in pursuit of information comparable with the *Yick Wo* and *Gomillion* cases presents its own problem, partially because of the small numbers of landfills available as comparisons. As one tries to pinpoint an area to a smaller and smaller degree, aiming to form a strong attachment to a waste site, one naturally has smaller quantities of any measurable quality or attribute at hand. For example, the two solid waste sites planned by Houston were both located in the same plaintiff-defined target area. While this might be indicative of a potential discrimination, the fact that one is only observing two decisions hurts attempts to add information together toward showing an incontrovertible prevailing *pattern* of discrimination.

[127]I.e., and including more than conversations limited to Section 1983, Ayres, Ian Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts are Unjustified. *Cal. L. Rev*, 95 2007; Seicshnaydre, Stacy E Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on a State of Mind in Antidiscrimination Law. *Wake Forest Law Review*, 42 2007; Seiner, Joseph A. Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach. *Yale L. & Pol'y Rev.* 25 2007; Lewis, Browne C. Changing the Bathwater and Keeping the Baby: Exploring New Ways of Evaluating Intent in Environmental Discrimination Cases. *St. Louis U. L.J.* 50 2006; Foster, Sheila R. Causation in Antidiscrimination Law: Beyond Intent Versus Impact. *Hous. L. Rev.* 41 2005; Galalis, David J. Environmental Justice and Title VI in the Wake of Alexander v. Sandoval: Disparate-Impact Regulations Still Valid Under Chevron. *B.C. Envt. Aff. L. R.* 31 2004; Primus, Richard A. Equal Protection and Disparate Impact: Round Three. *Harvard Law Review*, 117 2003, Nr. 2; Cody, Brendan South Camden Citizens in Action: Siting Decisions, Disparate Impact Discrimination, and Section 1983. *Ecology L.Q.* 29 2002; Worsham; Evans; Coleman, Leslie Ann It's the Thought that Counts: The Intent Requirement in Environmental Racism Claims. *St. Mary's L.J.* 25 1994; Eisenberg, Theodore/Johnson, Sheri Lynn The Effects of Intent: Do we know how legal standards work? *Cornell Law Review*, 76 1991; Eisenberg, Theodore Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication. *N.Y.U. L. Rev.* 52 1977

makes a case for a discriminatory relationship in a small area, the less likely it is to be able to maintain substantial connections with the overlying pattern that can withstand defendants testimony and judicial scrutiny. This problem then only disappears when the underlying discrimination is so gross or coarse as to be clearly recognizable from a spatial resolution that retains the overall pattern—such as the racial quality of the pictures at any level on analysis in *Yick Wo* or *Gomillion*. These cases, as seen in the microscope analogy, take on a near fractal quality in that their pattern remains no matter the scale of viewing.

3.3.3 Finding and Losing Intent

Even before more recent court cases which have cast doubt on, or completely closed off, such attempts at connecting distributions with legal protections,[128] researchers can conclude from the sheer lack of success that this is a high burden for plaintiffs to shoulder given the tools of traditional statistics. New techniques may help that,[129] or may continue to lend evidence against intentional discrimination.[130] But if courts continue to have set high hurdles from proving intentional discrimination, successfully battling pollutants on grounds like *Bean* and *East Bibb Twiggs* are unlikely.[131]

But that does not imply that we should focus research efforts on defining scales and metrics for the boundaries of environmental burdens, nor necessarily on strengthening the methodology of distribution-investigations.[132] In-

[128] McCaughey2004,Cody2002,Laufer2002

[129] See discussion of agglomeration formation models in geographical economics, Section 3.4

[130] See especially Bowen/Atlas/Lee; Mennis, and South Camden Citizens in Action v. New Jersey Department of Environmental Protection, 274 F.3d 771 (3rd Cir. 2001).

[131] Other oft-cited cases include: a failure by the NAACP to stop the PCB disposal dump in Warren County, NC, on discriminatory grounds in *NAACP v. Gorsuch*, No. 82-768-CIV-5 (E.D.N.C. Aug. 10, 1982). See Lazarus, Richard J. Pursuing "Environmental Justice": The distributional effects of environmental protection. *Northwestern University Law Review*, 87 1993, Nr. 3, p. 832 A court in Virginia also failed to see discriminatory intent to reject the permitting of a new landfill in R.I.S.E. (Residents Involved in Saving the Environment) v. Kay, 768 F. Supp. 1144. (1991) cf. Lavelle/Coyle, p. S8 The *R.I.S.E.* decision shows that when decision makers have "balanced the economic, environmental, and cultural needs of [the Locale] in a responsible and conscientious manner", more evidence of injustice will be necessary to move a court.

[132] Nor should the focus here be seen as attacking or detracting from the environmental justice-argument, especially as criticism implying there is no injustice. As Bowen explains: "[w]hile it would be seriously mistaken to claim that a scientific view is the only one that matters, it would be equally mistaken to discount the potential for scientific research to contribute positively to the solution of related problems." Bowen *Environmental Justice*

deed, the sociology literature has already moved away from the methodology debate.[133] Because of the ability of environmental burdens to easily transcend borders around the world, the degree of justice one sees is often a function of "what spatial scale one considers and how far along the commodity chain one follows a product."[134] Expending research to define spatial terms more precisely for the benefit of legal certainty and legal action does not scratch the underlying problem.

Bowen[135] provides a wonderful example that illustrates the statistical mechanics and the potential for different outcomes in a very brief fashion. Consider a $2x2$ contingency table, such as the one illustrated here.[136] One first

Table 3.1: Elementary Comparisons

	Environmental Risk	
Type of Neighbourhood	**Present**	**Absent**
Minority of Low Income	I	II
Not Minority or Low Income	III	IV

chooses a spatial area—neighbourhood, census tract, government area, postal code, etc.—and then fills in the number of observed situations. For instance, Quadrant I will be the number of minority or low-income residences in the area. With the spatial area set and the data collected, we must then make comparisons. Data in any single quadrant carries no intrinsic information about *disproportion*. It is only a comparison of the frequency in Quadrant I to the other 3 quadrants which reveals a disproportionate burden. Bowen explains that

> [i]f the number of residences in quadrant I is sufficiently greater with the expected number, on the basis of statistical hypotheses

through research-based decision making, p. 12. Perhaps too the fixation on race exerted too strong a force in steering the agenda away from strengthening empirical foundations and rather toward rapid political action.Bowen, William/Wells, Michael V The Politics and Reality of Environmental Justice Research: A History and Considerations for Public Administrators and Policymakers. *Public Administration Review*, 62 2002, Nr. 6, p. 696

[133] Esp. Holifield/Porter/Walker; and contributions in the special issue of *Antipode* (2009), vol. 41, no.4. Compare with earlier special editions in the sociology literature, like Perrolle, Judith A. Comments from the Special Edition Editor: The Emerging Dialogue on Environmental Justice. *Social Problems*, 40 February 1993, Nr. 1 Special Edition.

[134] Pellow, David Naguib *Resisting Global Toxics*. The MIT Press, 2007, p. 34.

[135] Bowen *Environmental Justice through research-based decision making*, p. 55-57.

[136] Adapted from Table 3.1, Ibid.

> tests, the conclusion would be that there exists a disproportionate exposure to risk at the minority and low-income locations.

But the numbers in each quadrant, which in turn dictate the outcome of statistical tests depend on the spatial area selected for analysis, sometimes sensitively.[137] Picture yourself as the collector of such data, simply going around the area dictated to you to investigate—a census tract with a waste site, or a zip code with a bus refueling station—putting a tally mark in each category as you find an example of minorities living within said area, or non-minorities living within it, before moving to the zip codes or census areas without a hazard. The number of tally marks in each column would clearly change if you changed the boundaries under investigation. This is the problem of choosing a spatial area. A relationship between race and risk might pop up at one spatial choice but disappear at another; choosing one set of boundaries to investigate may lead to a pile of tally marks in the minority box and few in the majority box, while adjusting those arbitrary boundary lines shifts the location of your tally marks.[138] This problem is separate but related to selection issues such as crop up when a particular form of environmental justice is sensitive to the region one selects to look within.[139]

Now, there are rules of thumb to follow when choosing a spatial area for statistical investigation. In the context of environmental justice, one should choose an area of risk or hazard where some exposure has meaning.

> "In general, the principle is that the appropriate level of spatial aggregation is a reflection of the underlying process or mechanism that gave rise to the data. For example, if one wants to study contagion of a disease such as flu, one would probably prefer to ag-

[137] This is known as the modifiable areal unit problem (MAUP) cf. Bowen *Environmental Justice through research-based decision making*, p. 57; Note Taquino, Michael/Parisi, Domenico/Gill., Duane A. Units of Analysis and the Environmental Justice Hypothesis: The Case of Industrial Hog Farms. *Soc. Sci. Q.* 83 2002. See also Cutter, Susan L. Issues in Environmental Justice Research. *Proceedings, Third National Conference on GIS and Public Health*, 3 1999; Cutter, Susan L./Holm, Danika/Clark, Lloyd The Role of Geographic Scales in Monitoring Environmental Justice. *Risk Analysis*, 16 1996, Nr. 4; Zimmermann, R. Social equity and environmental risk. *Risk Analysis*, 13 1993.

[138] examples include situations found in Asch/Seneca; Zimmermann; Bowen, William M./ Salling, Mark J. Toward Environmental Justice: Spatial equity in Ohio and Cleveland. *Annals of the Association of American Geographers*, 85 1995, Nr. 4; also notes in Cutter.

[139] e.g. Anderton, Douglas L. et al. Environmental Equity: The Demographics of Dumping. *Demography*, 31 1994; Anderton, D.L./Oakes, J.M./Egan, K.L. Environmental Equity in Superfund: Demographics of the discovery and prioritization of abandoned toxic sites. *Evaluation Review*, 21 1997, Nr. 1. Also see general critiques on these lines in Noonan

> gregate to census tract or perhaps counties, not states or nations. The reason for this is that diseases are communicated through contact of one person and another at a microgeographical level, and the larger levels of spatial aggregation such as states or nations miss this process."[140]

But besides such methodological common sense, there is nothing that will fully remove the arbitrary nature of the choice of spatial area. Of course, the researcher is limited to the spatial scale that information is collected at as well.[141] And the fact that environmental justice often must choose a spatial area based on the dependent variable they are studying[142] makes single studies largely ungeneralizable.[143]

The debate on spatial area is mentioned in passing but occupies a central place in the environmental justice literature. Hopefully new techniques of computerized mapping (Geographic Information Systems (GIS) and GPS) will make it an irrelevant discussion.[144] The point again here is illustration; so while early legal action was quick to try and tie pictures of disproportionate environmental burdens to legal action, and added examples of where this arguably was true, their relevance for the research at hand is mainly to show the weakness of the approach to solving environmental justice issues. It is entirely possible that a small scale reveals environmental justice, or equity, while expanding the view shows an entirely different result. To try and define

[140] Bowen *Environmental Justice through research-based decision making*, p. 57.

[141] Census data cannot be related below certain levels of aggregation for privacy concerns, for instance.

[142] Noonan, p. 1154, citing Ringquist; Bowen/Wells; Bowen *Environmental Justice through research-based decision making*

[143] Baden, Brett M./Noonan, Douglas S./Turaga, Rama Mohana Scales of Justice: Is there a Geographic Bias in Environmental Equity Analysis. *Journal of Environmental Planning and Management*, 50 2007, Nr. 2; also Cutter, p. 527

[144] Porter is a recent example of applying GIS/GPS systems to quantifying environmental justice outside of considerations of politically-defined scales: Porter, Rob *Environmental Justice and North Georgia Wilderness: A GIS based Analysis*. VDM Verlag, 2009. Also Pearce, J/Kingham, S/Zawar-Reza, P Every breath you take? Environmental justice and air pollution in Christchurch, New Zealand. *Environmental and Planning A*, 38 2005, Nr. 5; Also see Mennis: Mennis. His analysis focuses on access of different socio-economic groups to use and non-use value of wilderness area in the US Southeast. Also note Jerrett, M et al. A GIS-environmental justice analysis of particulate air-pollution in Hamilton, Canada. *Environment and Planning A*, 33 1996. Further see Maclachlan, John C. et al. Mapping health on the internet: A new tool for environmental justice and public health research. *Health and Place*, 13 2007; Buzzelli, Michael/Veenstra, Gerry New approaches to researching environmental justice: Combining critical theory, population health and geographical information sciences. *Health and Place*, 13 March 2007, Nr. 1; Fisher/Kelly/Romm. Liu demonstrated the utility of GIS as far back as 2001. Liu, Chap. 7-9.

any given picture as "an example of environmental injustice" can leave the advocate chasing their tail.

The illustrations here convey the desired image that the burden of proof for the plaintiff can become become quite complex, not only in terms of volumes of evidence, but also in finding and maintaining the discriminatory correlations through the levels—coarse through fine—of analysis, while maintaining that this is likely a moving scale for environmental justice advocates anyway. The failure of the courts to bite into cases of environmental justice is not just a function of cunning defense teams punching holes in plaintiffs statistical and spatially-dependent arguments, but a fundamental problem in defining environmental burdens in spatial terms. The picture is then, as predicted, one of distributed environments impacting a particular group to the level that they feel discriminated against, but without enough statistical evidence to connect that feeling to the letter of the existing law.

3.4 Describing Space: Geographical Economics

The traditional environmental justice paradigm, while doing a good job of providing a catalogue of events where one can look to see examples of what are generally accepted types of environmentally-based injustices, still has many criticisms to answer. Some criticisms came in the form of court rulings, as above. More specifically though are criticisms on the methodology, perhaps implied or implicit in the court rulings, which supported initial claims of environmental injustice. Recently, Noonen[145] levied the cogent criticism, notably also evident in Bowen's earlier critique[146], that

> "the predominantly static or cross-sectional analysis of the [environmental justice] research generally fails to incorporate a structural model of what might give rise to such equilibria. As such, many claims of environmental injustice might be seen as no more than lamenting that the group driving into a store's parking lot has more disposable income than the group driving away."

[145] Noonan, p. 1156.
[146] Bowen.

That this critique has been repeated for some time now, perhaps finding its earliest incarnation in the form of Been's early and much-cited study,[147] discussed at greater length below, is of much concern. In the limit, without addressing these methodological criticisms, environmental justice can become just an incarnation of social justice, without any special connotation.[148]

Only a few researchers have heeded the need to explain not only proximity of certain groups to burdensome environmental activities but also how that situation emerged. Bowen, Atlas, and Lee[149] are in that group, and note that failing to account for the pre-existing picture when testing for a group's propensity to be located near polluting facilities will bias the results of empirical work. The simple reason for this is that

> "geographical proximity relations have co-evolved through innumerable historical industrial and residential location decisions and their interactions. In turn, regional science theories indicate that these decisions have tended to be made directly and indirectly under the influence of agglomeration. One can thus deduce that the geographical density of firms at any given location will be related to the density of firms at neighboring locations."[150]

More simply stated, this observation means that the current state of affairs in an area influences the next state of affairs. Not accounting for this "momentum" in statistical regressions aimed at ferreting out a tendency for environmentally damaging activities to gather where disadvantaged groups are will grant too much explanatory power to variables that are in the regression. Again, this does not imply that there are not agglomerations of poor and minority populations clustered around polluting facilities or burdened disproportionately by the production side of the economy. What the call to account for agglomeration does criticize is the implication that where these distributions occur they are indicators of a ubiquitous discrimination. It does not

[147] Been, Vicki Analyzing Evidence of Environmental Justice. *Journal of Land Use & Environmental Law*, 11 1995, Nr. 1 Also note Been, Vicki/Gupta, Francis Coming to the Nuisance or Going to the Barrios? A Longitudinal analysis of environmental justice claims. *Ecology Law Quarterly*, 24 1997 and the challenge levied at empirical researchers to move away from cross-sectional studies and toward estimating structural rather than reduced-form models in Helfand, Gloria E./Peyton, L James A Conceptual Model of Environmental Justice. *Social Science Quarterly*, 80 March 1999, Nr. 1.

[148] Note a similar comment in Noonan, n. 5

[149] Bowen/Atlas/Lee.

[150] Ibid., p. 15-16.

lessen the descriptive power of the *Bean* case, nor the cases explored below.

The criticism that nearly all environmental justice studies have not accounted for agglomeration is somewhat lessened by the fact that the tools to deal with it are only recently entering a more mainstream consciousness.[151] Some of this mainstream work identifies itself under the title of economic geography, or geographical economics. And while more concerned with the economic implications and outcomes than with their relation to the environment or justice, their work is highly relevant given the largely still-unaddressed criticisms in traditional environmental justice work. The following sections give a very brief overview of the subject, coming on the heels of the above introduction of the economics of environmental distributions, to illustrate both a promising direction for more rigorous investigations of environmental justice and as further theoretical confirmation that modern economic activity will tend toward a clustering that could very well manifest itself as injust or inequitable environments.

3.4.1 The Field of Geographical Economics

Economic geography, or geographical economics,[152] is a relatively new field within the modern economic canon. Its goal is to incorporate spatial and geographical realities into more traditional economic analysis, building on top of and tangential to established subfields like trade and urban economics. The field diverges from trade economics as it allows for mobility of factors of production, not merely the exchange of goods, while it takes in to consideration that what is near to a particular locale imposes more influence on it than what is farther removed.[153] While these changes differentiate it from the more established trade economics literature, it is the fact that this focus allows for it to incorporate and investigate geographic concentrations which excites the environmental justice researchers. Geographical economics' stated purpose therefore is to "explain why certain economic activities tend to become established in particular places."[154]

Population alone is a weak determinate of the economic activity of an area; it is the type of economic activities which occur within the area that dictate

[151] Perhaps codified by the awarding of the 2008 Sveriges Riksbank Prize in Economic Sciences to Paul Krugman.
[152] Fujita/Thisse, p. 6.
[153] Combes/Mayer/Thisse, p. xiii.
[154] Fujita/Thisse, p. 3.

its role in the larger economy.[155] Those types of activities are linked together in dynamic relationships that reinforce decisions and cause patterns of organization to persist. The persistence via linkages is relevant for environmental justice both as an explanatory factor of the patterns advocates see and fight against and also as a rationale for why discriminatory intent is unlikely to reach levels of *Yick Wo* and *Gomillion*. These linkages are the economic benefits of locating economic activity in certain areas, benefits that may accrue external to those who are saddled with the environmental burdens, but benefits that rationalize choices without recourse to discrimination.

Three founders[156] of the field in economics describe it thusly:

> "The linkage story is easy to tell if one is willing to be a bit vague about the details. Producers, so the story goes, want to choose locations that have good access to large markets and to supplies of goods that they or their workers require. However, a place that for whatever reason already has a concentration of producers tends to offer a large market (because of the demand the producers and their workers generate) and a good supply of inputs and consumer goods (made by producers already there). These two advantages correspond precisely to the backward linkages and forward linkages of development theory. Because of these linkages, a spatial concentration of production, once established, may tend to persist, and a small difference in the initial economic size of the two otherwise equivalent locations may grow over time."[157]

The tone of the explanation is obviously steeped in economic thought, and depends on the assumption of some increasing returns to production, but is nevertheless important to the environmental justice discussion, especially coming on top of criticism that these are exactly the dynamics left out of mainstream environmental justice research. One is struck, however, in reading purely economic introductions to the subject at how similar the trains of thought between geographical economics and environmental justice research

[155] Huriot, Jean-Marie/Thisse, Jacques-François; Huriot, Jean-Marie/Thisse, Jacques-François, editors Chap. Introduction In The Economics of Cities. Cambridge, 2000, p. xi.

[156] Masahisa Fujita, Paul Krugman, and Anthony J. Venables. Paul Krugman won the 2008 Sveriges Riksbank Prize in Economic Sciences for his work in this area, specifically "for his analysis of trade patterns and location of economic activity." From nobelprize.org. ff

[157] Fujita, Masahisa/Krugman, Paul/Venables, Anthony J. *The Spatial Economy: Cities, Regions, and International Trade*. The MIT Press, 1999, p. 5.

are; the same feeling that one gets with the benefit of hindsight in reading early environmental economics prior to the codification of the environmental justice-term.[158] When an academic of one stripe reads a sentence that could be cut-and-pasted in to a book on another academic subject, there must be some room for collaboration.[159] An entire field within the rigorous context of economics which examines the spatial evolution of economic activity, the exact activity which causes environmental degradation, can only be beneficial for getting to the core issues of environmental distributions.

A few studies have already begun to account for agglomeration in their studies specifically aimed at environmental justice, traditionally framed.[160] Although there is a difference between accounting for agglomeration in spatial studies and the economic study of geography, there are similar underlying ideas for environmental justice.[161] And while this is assuredly not the place to introduce the legal audience to the details of the economic modeling[162] it does fill in a hole in the usual environmental justice chronology.

What one is looking at when investigating the appearance of cities is the balance (and imbalance) of two forces: agglomeration and dispersion. An area "grows" when agglomerative forces over power dispersion forces, shrinks when the opposite is true, and remains stable when the two balance. One of the big questions for the science—and for anyone interested in the overlay of environmental pollution—then is what comprises agglomerative and dispersive forces?

In the LULU example in Chapter 2 we already met one major agglomerative force: economies of scale. Expanding existing LULUs to take advantage of economies of scale, rather than opening new ones bring more "bang for the buck," or more benefit for each unit of environmental degradation.[163]

[158]Esp., as discussed at length above, Freeman III; Also Wenz, Peter S. *Environmental Justice*. SUNY Press, 1988

[159]For example, Huriot and Thisse explain in their introduction to geographical economics' view of cities that "the variables explaining spatial or regional imbalance within a small country are likely to differ from those explaining economic imbalance between the North and the South." Is this not a thought found in many environmental justice books, concluding that more research must be done to explain their own findings in larger, or, equally smaller, regions? Huriot/Thisse, p. xiii-xiv

[160]Esp. Bowen/Atlas/Lee; Mennis

[161]A good introduction is in Brakman, Steven/Garretsen, Harry/van Marrewijk, Chalres *The New Introduction to Geographical Economics*. 2nd edition. Cambridge: Cambridge University Press, 2009

[162]Nor is the author qualified for that task. But see the textbook treatments of Combes/Mayer/Thisse; Huriot/Thisse; Fujita/Krugman/Venables.

[163]McDermott, Charles J. Environmental Equity: A Waste Manager's Perspective. *Land*

Landfills—and for that matter, other LULUs—are in actuality no different than any firm or industry which pollutes, and it is hard to think of any production process of a relevant magnitude in the contemporary economy which does not pollute. And so dynamic forces which drive agglomeration include established industrial districts and business clusters, manufacturing areas, available transportation options and connecting routes, and the proximity of cities themselves.[164] Studying the agglomeration tendencies of industries, gleaning insights from the realities, efficiencies and costs of production, then is likely full of insights into the patterns of pollution with which environmental justice concerns itself. After all, "[t]he geographical areas in which these industries concentrate include many, if not most, of the same facilities at issue in environmental justice analyses."[165]

Cities do not only agglomerate though. Cities also can push and break apart. This is the counteracting force of dispersion; cities grow and evolve, bringing in businesses and people as well as spinning them off to the outlying areas. A great visual is the situation in the U.S. after World War II. Such evolved the now glorified "American dream" of a family home, a yard, and a car in the driveway. As subdivisions, cars, and transportation infrastructure drove the housing boom outside of more traditional city centers the outward motion "stole jobs and tax revenues from central cities."[166] Cities then changed and the utility provided by them for their residents took on different qualities and affected the relative benefits of other locations. But this is just an illustration of the many possibilities in studying the locations and dynamics of economic space. This story highlights not only the existence of transportation infrastructure, but the importance of cheaper transportation. Transportation costs play a central role in explaining the geography of economic activity.

This is only the first effect too. To continue with the illustrative U.S. story, as new population and business centers sprang up in the spaces surrounding

Use Forum, 2 Winter 1993, Nr. 1, p. 16. Note for completeness that this article was written as a contemporaneous response article from Charles J. McDermott, the then-director of Government Affairs at Waste Management Inc., to environmental justice-advocates. Nevertheless, he illustrates the technical, geographical, and geological problems of disposing other industries' wastes are increased by the commonly held belief that landfills, unlike the industries which they dispose for, should meet a zero emission standard, a belief which does not sit well with the benefits to agglomeration (should they be legitimately measured).

[164] Bowen/Atlas/Lee.

[165] Ibid.

[166] Davis, Mike *Ecology of Fear: Los Angeles and the Imagination of Disaster*. Vintage, 1999, p. 401.

cities, and concentrations formed in particular spots relative to others, "edge cities" then began to siphon revenue away from the original suburbs. The fiscal downside could be repeated; pressure builds on how to maintain infrastructure of original suburban areas and other "exurbs."[167] These dynamics, while decidedly not new[168] start to paint a picture similar to the lumpy environment which environmental justice advocates worry about, albeit focusing on production and consumption.

A reader versed in the economics of trade literature will find many similarities with geographical economics. Where traditional trade literature aimed at explaining production patterns mainly through differences in a location's endowments—factors of production, existing infrastructure, natural resources, etc[169]—and the uneven spatial distribution of original endowments gives each region its own comparative advantage and therefore trading momentum, geographical economics brings in the important aspect of increasing returns to scale. Attempts to apply international trade theory to spatial economics found that unequal endowments of resources is not enough to explain the trading patterns we see and the spatial ramifications they create.[170] That is, the economics of trade proved to be too limited in explaining the patterns of trade and, notably, agglomeration, which we see in reality.[171] Puga[172] explains that

> "[r]ecent theories of location can help us explain these [spatial] trends. [T]raditionally, international and regional economics have explained income disparities on the basis of differences between regions in their endowments of natural resources, factors of production, infrastructure, or technology. In this context, the removal

[167]Exurbs, or "extra-ubran" areas, are largely commuter (or "bedroom") areas, serving a nearby metropolitan or other concentrated employment area.

[168]The Chicago School triumvirate of sociology—Burgess, Park, and Janowitz— started on many of these research ideas in the 1920s with their concentric ring model. See Park, Robert E./Burgess, Ernest W./Janowitz, Morris *The City: Suggestions for Investigation of Human Behavior in the Urban Environment*. University of Chicago Press, 1984 (1925).

[169]Puga, Diego European regional policies in light of recent location theories. *Journal of Economic Geography*, 2 2002, p. 382.

[170]Fujita/Thisse, p. 7-8.

[171]Differences in the economics literature appear between those identifying external economies of scale—traditional economic literature, inter alia Arrow, Kenneth The economic implications of learning by doing. *Review of Economic Studies*, 29 1962; Romer, Paul Increaseing returns and long-run growth. *Journal of Political Economy*, 94 1986)—and external economies of scale—notably Krugman, Paul Increasing returns and economic geography. *Journal of Political Economy*, 99 1991—as the driving micro-foundation of agglomeration. cf. Bowen/Atlas/Lee.

[172]Puga, p. 374.

> of obstacles to the movement of goods and/or factors would by itself cause convergence of factor returns and living standards. Yet both casual observation and empirical work in the area show there are relevant forces missing from the traditional analysis, which can widen regional disparities—even without large differences in underlying characteristics—and prevent convergence."

It is increasing returns to scale and imperfect competition[173] in addition to allowing productive factors to be mobile, which are these missing forces in explaining the patterns we see. Increasing returns to scale recall are process which start, at some, level giving larger marginal increases in output than the marginal change in input. Imperfect competition adds in a twist that different actors or productive sectors face different cost structures in their production of competitive goods.

And while the pure geographical economics literature remains, in the main, focused on explanations of economic activities one can see how this view pertains to discussion of environmental justice. The study of spatial agglomeration simply reveals that there are cost and competitive advantages to being spatially close to others.[174] For the most simple factor, being close to others means lower transportation costs for both outgoing goods and incoming intermediates–spatial factors dictate a firm's costs structures. The change in costs structures have obvious effects on the competitive potential of other firms, often pressing them to locate in the same areas; a firm's choice of location is very rarely starts from a clean slate.

The common-sense observation that economic activity is "lumpy" coupled with ideas on how that lumpiness came to be makes for revealing and rigorous economic work. And while this introduction is only the sparsest of explanations, it reveals that attempts to explain a spatial pattern without accounting for these underlying forces would bring inaccurate conclusions.[175] The observed agglomeration then, in a real sense, becomes a variable capturing the history of an area, and established efficiencies take that history as inertia

[173] Note esp. the prescience of Hotelling, Harold Stability in Competition. *The Economic Journal*, 39 Mar 1929, Nr. 153

[174] *see* Bowen *Environmental Justice through research-based decision making*

[175] In an statistical sense, causal models aimed at explaining proximity relations but failing to incorporate agglomerative dynamics will be misspecified by omitting this relevant variable. Misspecification of models has effects then on parameter estimates and therefore also the research's conclusions.

toward the future. When one is attempting to explain the current spatial situation it stands to reason that the historical progression—and thus also the contemporaneous lock-in effects—could be important explanatory variables.

Geographical economics then speaks highly of the interaction which agglomeration fosters, interaction which brings productive advantages and even individual utility enhancements.[176] These benefits accrue to society in general and are reflected in growth, both in numbers (population) and in traditional economic measures like output. Here then environmental justice-minded simply notes that the detriments do not follow the same pattern of distribution as the benefits, at least insofar as environmental quality goes. And while the economic science is explaining the productive side of the picture, the environmental picture which goes along with casts the shadow we know as environmental justice.

3.4.2 The Relevance of New Economic Geography

This introduction is unfortunately bounded by the larger goal of this thesis from delving into more detailed descriptions and the literature's well-developed models. The relevance, however, of this field to the environmental justice discussion should be clear. First, there are well established benefits to clustering economic activity which have nothing to do with active discrimination of the type alluded to in the *Bean* case, or implied in many other studies. This does not mean, however, the environmental justice is somehow not an issue. To the contrary, geographical economics lends more support to the prediction that, at a minimum, the usage of economic space will not spread environmental burdens equally. In this sense, geographical economics could be a rigorous tool for modeling the usage of environmental resources. Secondly, and most important for those looking to address environmental injustices, all policies will feed back into spatial separation. Building a new rail line, commuter rail or expanding highways, education subsidy, community develop or urban renewal, along with traditional environmental policies, will all create new linkages in economic space, shifting the map of economic activity in complex, but quantifiable, ways. New economic geography helps us understand the movements, and, to some extent, predict outcomes. This ability, and the potential for much growth in the field, will serve a practical purpose in the law of environmental

[176] I.e. Akerloff, George Social distance and social decisions. *Econometrica*, 65 1997

justice. Moreover, it must play a role in the management of environmental justice.

Bowen, Atlas, and Lee[177] are among the very first to start bringing agglomeration studies—regional science and aspects of economic geography—into the environmental justice literature proper.[178] Their recent work is notable because of its use in the environmental justice case *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*[179] The work shows that accurately incorporating agglomeration effects into analysis is "indispensable to an accurate representation and reasonably complete explanation of the proximity of environmentally regulated facilities to people in environmental justice research."[180]

> "If environmental disamenities are more prevalent around certain population groups, identifying the appropriate environmental protection, public health, and community planning remedies requires knowing what actually caused the situation. Ignoring or incompletely considering regional science factors such as agglomeration can mislead the public, researchers and policy-makers into pursuing costly and ineffective solutions."[181]

If agglomeration is the problem environmental justice wishes to address, this research shows that it is likely to be a problem. It is unlikely that one can address this on any discrimination stance, however.

There will be a lot of work to do before one can bring geographical economics into the environmental justice literature. To be sure, controlling for agglomeration in statistical works is a smaller adjustment to "traditional" environmental justice work than to start explaining from whole cloth the emergence of agglomerative forces. The thrust of the economic research still runs strongly parallel to traditional trade concerns, and therefore could be seen to focus on output, urban structures, and transportation costs more than would be helpful to rural environmental justice concerns or areas with static polluting industries sans growth. Perhaps economic geography even drills down too far.

[177] Bowen/Atlas/Lee.

[178] Also see Dijkstra, Bouwe R/de Vries, Frans P Location choice by households and polluting firms: An evolutionary approach. *European Economic Review*, 50 2006

[179] *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, Civil Action No. 01-702 (FLW) (D. NJ 31 March 2006).

[180] Bowen/Atlas/Lee, p..

[181] Ibid., p. 19.

Examining the scale economies of production at the firm level, transportation costs,[182] and the makeup of the consumer and working population only to then have to build a picture of the environmental impact of the emergent picture might grant more heat than light to the environmental justice discourse.

The point of this otherwise digressive section was not to attempt to build, nor to attempt to convince others to try and build, a model of environmental justice based on structural economic models. It was rather to highlight, in the face of cogent recent critiques[183] stressing the need to account for agglomeration of industry and the momentum that such dynamics lend to the emergence of environmental justice-situations, that an entire section of economics dedicates itself already to the pursuit of explaining agglomeration. Perhaps more importantly is the very basic notion of that research that modern productive society tends to cluster productive activities in specific areas for very specific economic reasons.

Geographical economics is constantly adding *economic rationale* as to why firms live where they do, and by extension, why they utilize the environment and generate burdens where they do. It is a science which rationalizes why firms exist—or hope to exist, in the case they are looking for a permit—completely outside of racial or socioeconomic concerns. As this was the most damaging to environmental justice efforts toward change in academia and in the courtroom, it is a field which advocates must understand in order to evolve their concerns as science's understanding of the shapes economic activity take increase.

To wit, the current state of geographical economics does not yet have many insights into what policy even economics would advocate as spatial policy;[184] if economists cannot yet help to plan a city on economic grounds, then environmental justice cannot yet work on a optimal response or compensatory reaction for environmental concerns.[185] But it also cannot continue to ad-

[182]The lowering of which often can promote agglomeration. Centripetal forces—linkages—can perhaps counterintuitively convince firms to form clusters even though transportation costs are low and less important in cost considerations. Fujita/Thisse, p. 46-7

[183]Notably Bowen/Atlas/Lee; Noonan

[184]Fujita/Thisse, p. 60.

[185]Nevertheless, none of this implies that a discrepancy between environmental goods and lower incomes is a new or newly recognized phenomenon to policy makers. Mike Davis (p. 67, 1999) cites a particularly telling acknowledgement in a 1930 planning report for the booming Los Angeles area, written by Frederick Law Olmstead Jr and Harlan Bartholomew. "Those of lower incomes generally live in small-lot, single-family home districts, and have more children and less leisure time in which to go to distant parks and recreational areas. These families comprise 65 percent of the population, and they should be given first consideration."

vocate in the same fashion that it did before, nor continue to assume that agglomeration and social momentum is an ignorable factor.

The concerns though are more than just a cry for advocates to arm themselves against the increasingly armoured academics; it goes to the heart of what environmental justice should advocate. Recall the concern of the "hyperspatiality" of environmental burdens where a successful environmental justice advocacy program in one area merely shifts the burden to another area, until the burden is met with less resistance.[186] It very well might be that in an economic geography sense, the first choice of where to pollute is indeed the most efficient locale. Shifting it to another area only burdens another group of people and society gains an economic inefficiency tax on that industry's product. The end result is in any event even more pollution for the world to deal with than would have been created in the more efficient location. What then did environmental justice advocacy accomplish?

That is not to say that advocacy is wrong; certainly the people who are not burdened now by the pollution gain much. And they are due their say, as we will discuss in the upcoming chapter. But the economics has muddied the water of how to regulate or set up policy that could effectively address the myriad problems identified by not only environmental justice research but the various strands of economics that now surround and infuse it. Continued work in economic geography could lead to new insights, especially if research attempts to overlay environmental distributions on to geographical economics models. But for now, the conclusions outlined here support the conclusion that, like in the simpler models, the modern economy is tilting the environmental burdens towards certain areas. If those areas are also connected to certain socioeconomic groups, minorities, or the poor, then economics will be burdening those least able to bear the burdens, and also least able to change the situation. The following section returns then to the environmental justice literature proper to continue reinforcing the connections between a tilted and agglomerative environment and such groups.

Davis, p. 67 The reality in modern L.A. harkens back to the problems of democracy and population majority versus financial majority.

[186] See Pellow.

3.5 Collecting Evidence

While the early environmental justice movement did not gain a legal victory to hang its hat on in Bean v. Southwestern Management Corp., it did gain a toehold in academic and legal literature. The toehold, and the studies to follow, help make the point of this chapter—connecting the empirical reality of a distributed environment to the proclivity to impact a minority of the populace. This conclusion arises in hindsight from the same literature that saw the currents of social injustice, racism, and the shortcomings of environmentalism begin to coalesce around a central idea, environmental justice, and begin to "become aware of itself"[187] in the early 1980s.

Also in hindsight, the pull away from the wider social issues and toward advocacy and change based on charges of racial discrimination are also quite obvious. The problems with the *Bean* case revolved around a lack of compelling evidence that the siting of waste facilities followed a discriminatory pattern. As such, the case tied in strongly with others where minorities and low-income groups felt slighted by the lack of resolutions to discriminatory effects. The feeling of being victimized twice, once by the environmental problem and then again by a justice system that was failing to bring change in what had all the hallmarks of discrimination. And all because the causes themselves could not be proven to be intentional discriminatory, a rather esoteric legal loophole to a populace shouldered with day-to-day environmental burdens.

The literature on discrimination in the United States is nothing if not expansive, and a full exploration would be beyond the focus of this book. However, as the civil rights literature is a prominent area where the United States differs from Europe, it is necessary to slowly develop a broad strokes pictures of the situation in the U.S.[188] The development helps both secure the aim of this chapter with more illustrations of the proclivity to impact minorities with burdens, now illustrated by the need for, and failings of, anti-discrimination policy, and the general weakness of the existing regulatory structure for the ends desired by environmental justice.

In addition to the high hurdle of intent, the fact that the remedies for

[187] Martinez-Alier, p. 12.

[188] Kruize (p. 139, 2007) notes explicitly that the racism undertones and the grassroots support so central to the U.S. environmental justice literature are not present in the Netherlands. Also see Elvers, Horst-Dietrich/Gross, Matthias/Heinrichs, Harald The Diversity of Environmental Justice: Towards a European Approach. *European Societies*, 10 2008.

discriminatory impacts are quite broad makes for difficult judicial headway.[189] As the statutes appealed to in this and subsequent environmental justice cases were meant to fight the persistent racism and segregation in the United States following not only the Civil War—embodied in the 14th Amendment to the United States Constitution—but also the "separate but equal" doctrine left over from the legacy of Plessy v. Ferguson,[190] and the 1964 Civil Rights Act—especially Title VI[191]—the remedies were significantly strong.[192] An action deemed in violation of the strong and complete protection of civil rights naturally results in an injunction of the activity, and remedies theretofore. Ruling in favor of a plaintiff then labels the infringing activity inherently illegal and opens the door for a multitude of similar litigation.[193] Courts are usually quite mindful of making decisions which would open the proverbial floodgates of new litigation.

Due to this difficult legal position, potential claimants find themselves in a very strongly bounded position where maneuvering in directions not already charted by previous discrimination cases is unlikely to yield a favorable ruling. Therefore, much of the U.S. environmental justice literature subsequent to *Bean* has focused on creating a tight and replicable link between the distributions of environmental quality and an undeniable discriminatory pattern. In a paper setting out to bolster claims like these, Bullard presented the work he started as an expert witness in the *Bean* case and worked to show that there was, indeed, a pattern.[194]

The evolution of environmental justice away from economics or environmentalism-proper really begins here, transformed now into a perspective that the *overly-*

[189] See also Lawrence III, p. 354 and discussions therein, and also Brest, Paul Forward: In Defense of the Antidiscrimination Principle. *Harvard Law Review*, 90 1977, Nr. 1

[190] 163 U.S. 537 (1896) In this landmark case, the Supreme Court limited the federal government's ability to hinder individuals' racist actions. The case's famous "separate but equal" quotation comes from the court's ruling that the State of Louisiana could require separate accommodations on trains for blacks and whites. The court made its findings based on the superficial fact that the law itself made no mention of an "inferiority' of blacks" and, quoting the majority opinion penned by Justice Henry Brown, it was only the "colored race" who "chooses to put that construction upon it." The ruling was not overturned until 1954, in Brown v. Board of Education 347 U.S. 483 (1954).

[191] Discussed in more detail, including the differences between the EPC, Section 1983, and §601 and §602 of Title VI, in Chapter 5

[192] For a thorough discussion, see Idem Forward: In Defense of the Antidiscrimination Principle. *Harvard Law Review*, 90 1977, Nr. 1

[193] Lawrence III, p. 320.

[194] See Robert D. Bullard's personal write-up on the Environmental Justice Resource Center's (EJRC) website. Also on file with the author.

ing environmental inequity is a reflection (or manifestation) of the *underlying* inequity among minorities. Therefore, environmental injustice must be addressed and rectified as a standing situation. At best, environmental justice finds examples of minorities burdened more than the majority by environmental ills, but at worst it casts light on a form of active discrimination embedded in American society.[195]

The idea that there is an embedded racism comes across strongly in Bullard's work, especially in that Houston's housing distribution itself is "somewhat erratic," with a "proliferation of waste disposal facilities" throughout.[196] At the outset, the somewhat peculiar dynamics of Houston—a port city with rapid expansion[197] and without zoning—can be both a good and bad laboratory to explore environmental justice. On the one hand, without zoning one could argue that the outcomes are the pure, or unencumbered and unbounded and therefore reveal the way market mechanisms work with regard to distributing environmental quality. With the one major preventative measure for segmenting different land uses removed we then observe what "naturally" wants to happen—including racist tendencies that zoning ostensibly tries to keep in check.[198]

On the other hand, because zoning is such a well-employed method for protecting against a broad-stroke realization of environmental injustice, to examine a city without zoning may lead to stronger conclusions than can be supported in a more global perspective. With that in mind, Bullard's focus on a small area and the small number of actual waste-handling sites in Houston

[195]For an introduction into intrinsic racism in the context of discrimination—especially with regard to the discriminatory intent debate implicit in environmental justice legal discussion, see Lawrence III, Charles R. The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism. *Stanford Law Review*, 39 1987. While there are many references for studying latent racism in the U.S., this is contemporaneous with the discussion here, and hence reveals perspective prior to the entry of environmental discrimination concerns.

[196]Bullard *Sociological Inquiry 53 [1983]*, p. 274. Houston has the somewhat dubious distinction of being the only large American city without zoning laws. The city is still without zoning laws today. Zoning laws, as described by Bullard, "[have] been the major land use control of external diseconomies and disamenities imposed by nonresidential activities on nearby residents." ibid. Zoning's goal of separating incompatible land uses, such as industrial production and residential neighborhoods.

[197]Ibid., p. 274,75 and also see Bullard, Robert D./Tryman, D. L. Competition for Decent Housing: A Focus on Housing Discrimination Complaints in a Sunbelt City. *Journal of Ethnic Studies*, 7 Winter 1980 for more information on the preexisting conditions and Houston's growth.

[198]Whether zoning actually operates to reduce racism is another matter. Barry notes that zoning is not equally applied or enforced, and is responsive to wealth, property, and political power. See Barry, p. 48

did allow for detailed research into the then-current situation—an approach aimed at winning the *Bean* trial by convincing the judge of a strong pattern of discrimination.

But the pattern of today is not the pattern of yesterday. While a critique of methods could take another book, suffice it to say that other variables could influence not only the original siting decision, but the demographic composition of the surrounding area; both contemporaneously and in the future. These were factors in the larger causality of agglomerations explored above in Section 3.4 There is also the problem of causality, a factor which plays heavily in trying to convince a court of a direct linkage between a distribution and an intent to discriminate. Did these waste sites come to minority neighborhoods, or did the neighborhoods expand around the nuisance, due to perhaps depressed property values?[199] Also, did the need for the waste site derive from the growth of the community into which it was placed, or from the growth of a "richer" neighbourhood in the vicinity? As Levins quips,

> "...neighborhoods are not simply random pieces of environment. They're structured. Wherever there is a rich neighborhood, you need a poor neighborhood...to serve it."[200]

Here, again, the point is not a catalogue of weak points but to highlight some of the studies which gave birth to environmental justice and link unequivocally the ability of the distributed environment to impact a minority of the populace to such a degree that they seek legal redress, but find little to no protection.

3.5.1 Congressional and Congregational Studies

Continuing on the path of illustrating the linkages between a distributed environment and the human condition, a descriptive study of four southern hazardous waste sites was published by the United States General Accounting Office (USGAO). The study came at the request of a U.S. Congressman who was personally involved in the protests surrounding one of the proposed waste sites.[201] Although the stated objective of the study "was to determine the

[199] For more comments alone these lines, see Been *The Yale Law Journal 103 [1994]*; Been/Gupta

[200] Levins, Richard; Hofrichter, Richard, editor Chap. Is Capitalism a Disease? In Health and Social Justice. John Wiley and Sons, 2003, p. 377.

[201] Congressman Walter E. Fauntroy was one of the over 500 people arrested at the Afton, in Warren County, North Carolina site. See Mohai/Bryant, p. 924

correlation between the location of hazardous waste landfills and the racial and economic status of the surrounding communities,"[202] the study looked at four arbitrarily chosen sites confined to the southern United States—a location previously of concern for discrimination.[203] With so many things the report *did not* do, the conclusions are similarly bounded to descriptions; good for the illustrations necessary in this research but not for the legal direction environmental justice was angling.

The four sites selected[204] all had significant black populated census tracts surrounding them.[205] In each case, the surrounding area's population of black residents was larger than the state's average black population.[206] Also, the percent of the adjacent population below the poverty line was higher than state average of poor individuals. Furthermore, of those below the poverty lines in the adjacent census tracts, between 90 and 100% were black.

---

[202]United States General Accounting Office *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities*. Washington, D.C., June 1 1983 – Technical report, p. 2 the study was purely descriptive. The committee explicitly reports,

> "...we did not verify Bureau of the Census supplied data nor determine why the sites were selected, the population-mix of the area when the site was established, the distribution of the population around the landfill, nor how the communities racial and economic status compared to others in the State. Also, we did not determine whether any of these sites pose a risk to the surrounding communities."

ibid., p. 3. But compare with Hornstein, Donald Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis. *Colum. L. Rev.* 92 1992 for a criticism of defining risk in terms of expected losses rather than expected utilities.

[203]To be specific, the hazard sites were selected from EPA Region IV states: Alabama, Florida, Georgia, Kentucky, Mississippi. The U.S.'s Deep South is over-represented in the bottom of the U.S.'s list of environmental quality indicators Cutter, Susan L Race, Class, and Environmental Justice. *Progress in Human Geography*, 19 1995, Nr. 1; See also Hall, B./ Kerr, M. L. *1991-1992 Green Index: A State-by-State Guide to the Nation's Environmental Health*. Island Press, 1991 for relevant semi-contemporaneous visual data.

[204]Sumter County, Alabama; Chester County, South Carolina; Sumter County, South Carolina; and Warren County PCB landfill, North Carolina. The PCB landfill siting and the protests it ignited—including a strong presence from the Congressional Black Caucus—was the impetus for the GAO study. See Bullard, Robert D. *The Quest for Environmental Justice*. Sierra Club Books, 2005, p. 20, and Baugh, Joyce A. African-Americans and the Environment. *Policy Studies Journal*, 19 Spring 1991, Nr. 2, p. 184. Also see Warren Co. v. State of North Carolina 528 F. Supp. 276 (1981) and Henry F. Twitty v. State of North Carolina 527 F. Supp. 778 (1981). These two cases were levied against the siting, although the issues therein were based on non-discriminatory grounds.

[205]The 'neighborhood' here was defined as census areas (not tracts) within a 4 mile radius of the landfill. See Appendix p. 1, United States General Accounting Office.

[206]90% in adjacent census areas versus 26% (Alabama) or 35% (Mississippi) for Sumter County, Alabama, which borders Mississippi; 38% versus 30% for Chester County, South Carolina; 52% versus 30% for Sumter County, South Carolina; and 66% versus 22% for Warren County, North Carolina.

The evidence here, just as in *Bean v. Southwestern Waste Management Corp.*, lends more eyebrow-raising descriptions giving the equity-conscious an impression that something is unjust, that there is a tendency here that needs explanation.[207] More damaging—and motivating—imagery appeared in perhaps the most famous descriptive study: the Council on Racial Justice.

The United Church of Christ[208] (UCC) study is arguably the most cited document in the traditional environmental justice canon. Propelled by their experience at the 1982 Warren County protests,[209] the council conducted a nationwide study on the spatial connection between minority populations and toxic waste. The study revealed earthshaking talking points. According to their statistical analysis they found that the proportion of minority residents in communities with a hazardous waste facility was double the proportion of minorities in non-hosting communities.[210] In communities which hosted two or more facilities, the proportion of minorities was triple that of non-hosting communities. Given their data, they were also able to show that race was indeed a better predictor of the presence of a hazardous waste facility than income.[211] The economics behind land pricing, discussed above, coupled with lack of political power and mobility were institutionalized forms of racism seemingly led to discriminatory outcomes in the same way as overt forms of racism.

Although the CRJ study imbued the fledgling environmental justice movement with momentum, its major conclusions came under fire in later years.[212] Been's critique is perhaps the most comprehensive and is discussed below. And while it could be seen to have angered the environmental justice literature as it was evolving at the time, its criticisms can be seen to lend support to the

[207] But compare criticisms in Been *The Yale Law Journal 103 [1994]*; Boerner, Christopher/Lambert, Thomas A. *Environmental Inequity: Economic Causes, Economic Solutions.* Policy Study, 1995 – Technical report; Lambert/Boerner

[208] United Church of Christ *Toxic Waste and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites.* New York, 1987 – Technical report.

[209] Mohai/Bryant.

[210] United Church of Christ. Also discussion in Mohai/Bryant, p. 63

[211] Other studies also supported that race outperforms income as a predictor of proximity to hazardous waste. See Ibid.

[212] And earlier. In 1991, Waste Management Inc., conducted their own study of their waste disposal sites mimicking the CRJ methodology in so far as using 1980 demographics within 5 digit ZIP code areas around their 130 sites. They found that 76% of their facilities were located in zip code tracts "with a white population equal to or greater than the host state average."McDermott, p. 15

tact this research is taking.

3.5.2 Correlation and Causation

The studies quoted thus far have all found a correlation between social disparities and pollution. Their empirical question has been simple: given two areas with notable environmental burdens, is the area around said factors likely to be populated by minorities and/or low income members of society?[213] There is a small problem however. As Laurian[214] cogently noted in her study on French environmental distributions, the correlation does not

> "establish causal relationships between population characteristics and the location of hazardous sites, or to identify the mechanisms that lead some towns to host more hazardous sites than others. In other words, it does not reveal any procedural injustice."

Although the lens of hindsight has made this clear, it appears that courts in the original cases reflected the judgement.

Been took the first critical look at the founding research of the environmental justice movement in the United States. One of her studies[215] re-examined the data utilized by Bullard in "Solid Wastes Sites and the Black Houston Community" and the United States General Accounting Office (USGAO) in their report, "Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities". The criticism eluded to previously is the role that market mechanisms play in bringing people to, and pushing people away, from waste sites. This study was the first—though certainly not the last[216]—to investigate the way market mechanisms operate *over time*. The conclusion shows that to fully explain the phenomenon of disproportionate environmental distributions, research *must* consider the movements over time. Without the temporal dimension, the snapshots cannot accurately answer the question of whether the siting was discriminatory or not; they only can show that the sites are largely minority at the time of the snapshot.

[213] Bowen *Environmental Justice through research-based decision making*, p. 43.
[214] Laurian, p. 73.
[215] Been *The Yale Law Journal 103 [1994]*.
[216] Following quickly on the heels of this focus on market mechanisms was Lambert/ Boerner

In this sense, Been's research is a formal example of the concerns voiced in the preceding section: the data and methodology employed necessarily limits the degree to which one can interpret and extend results. That is, they can illustrate an uneven environment, as the research at hand contends is prevalent, but they cannot prove a degree of targeted malice or even unfortunate ignorance on the part of policy makers.[217]

In stating a correlation between the siting decision and the disproportionate impact assumes that the demographics of the site at the time of taking the snapshot were the same during the decision. Although the decision to site a hazardous facility occurs several years prior to the snapshots of demographic characteristics used in the studies, this temporal dimension was not inspected. Therefore, Been repeated the studies by analyzing the demographic characteristics of the sites shortly[218] before the construction of the site, and then further watching the progressions of demographic characteristics as the site opens.

Echoing economic modeling, Been states that a LULU affects its surrounding territory in two ways: 1) Neighbors with the means to do so can be induced to leave because of the LULU's negative presence and 2) the LULU can depress the surrounding land values. The first situation is often dubbed "white

[217] As noted by Bowen Bowen, William M Comments on "Every Breath You Take...": The Demographics of Toxic Air Releases in Southern California. *Economic Development Quarterly*, 13 1999, Nr. 2, p. 124, this is fundamental in doing research, citing from a classic text on experimental design, Campbell, Donald T./Stanley, Julian C. *Experimental and Quasi-experimental Designs for Research.* Houghton Mifflin Company, 1963. Been carefully preempts unsupported conclusions stemming from her work by noting strongly in the introduction that "[l]ike the original studies, the extensions involve samples too small to establish conclusively the cause of disproportionate siting."Been *The Yale Law Journal 103 [1994]*, p. 1387

[218] Been utilized the U.S. Census data available immediately before the sites became operational. That is, for sites such as the GAO sites, permitted in 1972-1977, the appropriate census data to examine bias in the siting decision is 1970. The same logic is applied to the other sites given their time of permitting. See Ibid., p. 1398,1400-01. Furthermore, she utilized Census tract data, instead of US Postal Service ZIP code data. In addition to spatial arguments, examined in detail in Fahsbender, John J. An Analytical Approach to Defining the Affected Neighborhood in the Environmental Context. *New York University Environmental Law Journal*, 5 1996, as to what size reveals the right relationships, there is the argument that census tracts are less apt to change over time than ZIP codes. They are specifically drawn to vary little over time and when changes are made the Census Bureau publishes the reason.Been *Journal of Land Use & Environmental Law 11 [1995]*, p. 4. ZIP codes, on the contrary, change based on the convenience of the US Postal Service. See also Monmonier, Mark Zip Codes, Data Compatibility, and Environmental Racism. *GIS Law*, 2 1994. For discussion on the many issues to choosing physical space measurements in the environmental justice context see Bowen/Wells; Taquino/Parisi/Gill.; Mennis; Liu, Chap. 5and Fahsbender.

flight", carrying the connotation that only the relatively richer and more mobile whites can escape from the coming LULU. The second effect operates in two directions. Directly, the lower prices will make the real estate more available to those with less wealth. Supplementary to this is the effect of the more wealthy becoming less attracted to land around the LULU, either through association effects such as desiring to live near other of similar socioeconomic status—who via effect 1) are already leaving that area[219]—or through worries that the land will not retain or increase its value as much as similarly priced property left unexposed to a LULU. Been summarizes that lowered land prices can bring in other, new industrial uses,[220] and

> "[t]he dynamics of the housing market therefore are likely to cause the poor and people of color to move to or remain in the neighborhoods in which LULUs are located, *regardless of the demographics of the communities when the LULUs were first sited.*"[221]

The quote carries the implication then that researchers should *expect* to find correlations between environmental disamenities and poor and minority communities,[222] as well as a gravity to the siting process, a gravity that can account for some, if not all, of the pollution agglomeration.[223]

That said, Been indeed found that the siting of the four landfills in the GAO study were, in fact, disproportionately minority tracts at the time of the siting *decisions*. The census data predating the operations of each landfill are distinctly more minority oriented than the rest of the state—the metric used for comparison. Counterintuitive to this supported conclusion however is that the tracts actually experienced a *decrease*—albeit somewhat insignificant in two tracts—in the population of black residents in the following censuses.[224] Furthermore, the relative poverty levels, relative median family incomes, and even the relative median housing values of the affected communities changed only slightly in the subsequent censuses.[225]

These financial results are marginally discordant with prevailing expectations in a LULU situation, even if their magnitudes are relatively slight. The

[219]Been *The Yale Law Journal 103 [1994]*, p. 1389.
[220]Lambert/Boerner, p. 202.
[221][p. 1390]Been1994 (emphasis added).
[222]Schweitzer, Lisa/Stephenson Jr., Max Right Answers, Wrong Questions: Environmental Justice. *Urban Studies*, 44 February 2007, Nr. 2.
[223]Agglomeration is taken up in more detail in Section 3.4.
[224]Been *The Yale Law Journal 103 [1994]*, Appendix, Table 1
[225]Ibid., Appendix, Table 2-4

demographic conclusions however support the suggestion that siting focused on black communities. A re-examination of Bullard's study on Houston, however, does show evidence of significant market dynamics at work in creating the pattern of disproportionate environmental impacts.

Between the sitings in the 1970s and the census in 1980 all of the census tracts neighboring the sites show significant relative growth in their minority population, a trend which largely continued through the 1990 census.[226] The sitings also negatively impacted the poverty rates in the affected census.[227] Furthermore, the sitings in general hurt the surrounding property values.[228] The magnification of disproportionate effects through market mechanisms is claimed in other studies, and also in defense of industry.[229]

The GAO sites, in contrast to those in Houston, were significantly larger and set in rural areas.[230] A large landfill is similar to a larger factory; it needs more resources to operate than a smaller factory. If size of the landfills dictate the personal required to operate them, then size also affects the potential for economic growth effects via job creation. The particular nature of the LULU creates different job dynamics and therefore drives the demographic change in

[226] see Been *The Yale Law Journal 103 [1994]*, Appendix, Table 5

[227] Notably increasing poverty rates while the rest of the County saw a decrease in poverty rates between 1970 and 1980, and then even larger than the overall poverty increases the County experienced from 1980-1990.Ibid., p. 1404, Appendix Table 6

[228] Ibid., Appendix Table 7.

[229] See Hill, Barry E. *Environmental Justice: Legal Theory and Practice*. Environmental Law Institute Press, 2009, p. 442, relaying the testimony of a former Chairman of the Chemical Manufacturers Association, Roger Hirl, who states "some in industry have argued that many industrial facilities were constructed 20-40 years ago, when the land was cheap and the areas were relatively unpopulated. After the facilities were constructed, people moved into those areas and built homes so that they could be close to their jobs." That is, industry can and has appealed to temporal information to dilute causality and intent in discriminatory siting. See again Section 3.4. Also see the situation discussed by Kruize (Kruize, Hanneke *On environmental equity: exploring the distribution of environmental quality among socio-economic categories in the Netherlands*. Ph. D thesis, Universiteit Utrecht, 2007, p. 140). In her dissection of the history of exposure to railroad noises in the Netherlands a historical study finds that although there were income-related aspects to the groups currently most exposed to railroad traffic, it was an income-related historical "lock-in" that was to blame; an explanation of the same sort as that in Houston though the outcome and did not have any racial backstory. The same lock-in occurs with higher incomes and green space. Another Dutch example from Kruize's study is the more prosperous in the 19th century. They were the first to be able to buy land outside the cities. In many cases, they still own those properties which are still contained in greener areas. The lock-in is the income distribution of earlier times.

[230] Been *The Yale Law Journal 103 [1994]*, p. 1405-06.

the area.[231] The urban nature of the sites in Houston meant both a smaller operating size and also a lower inducement for migration to the area; given the housing and transportation dynamics of city life.

Seen from this perspective, both the GAO and Houston examinations give support to the hypothesis the market mechanisms are important to consider in the siting of LULU's, they can affect both the initial characteristics of the burden's distribution, as well as effect changes both toward, and away from, disproportionate impacts in the future. Been therefore draws a critical line between disproportionate *siting*, and disproportionate *outcomes*. The distinction is important in that the former is a human action which can be labeled as discriminatory. In the latter, it is the complicated "confluence of the forces of housing discrimination, poverty, and free market economics"[232] which carry the discriminatory burden.[233] In this latter, and arguably more general case, the solutions to environmental justice concerns are then also much more complex than legal action on discriminatory grounds. The burdens are still accumulating, tilting toward certain groups, but the causality is not a single policy decision. As she herself notes, environmental justice is

> "a much more ambiguous and complicated entanglement of class, race, educational attainment, occupational patterns, relationships between the metropolitan areas and rural or non-metropolitan cities and possibly market dynamics."[234]

[231]Been reports that the Sumter County facility employed 300 people, 60% of whom lived in the county. Ibid., p. 1405, footnote 91, cf. McDermott, Charles J. Environmental Equity: A Waste Manager's Perspective. *Land Use Forum*, 2 Winter 1993, Nr. 1.

[232]Been *The Yale Law Journal 103 [1994]*, p. 1406.

[233]Kiel and Zabel Kiel/Zabel break down the blanket term "housing discrimination", into discrimination and prejudice, exposing what Bean eluded to as the "confluence of forces." Discrimination then becomes the act of selling houses to non-whites at prices higher than that which whites could purchase the house for. Prejudice is a less direct impact, stemming from a feeling or attitude against minorities, where the house prices are affected by the presence or absence of whites in the neighborhood. In this situation, "white flight" is a type of prejudice which impacts house prices. Kiel and Zabel expand Bean's interpretation and show that

> "[t]he combination of discrimination and prejudice can lead to submarkets defined by the racial composition of neighborhoods, resulting in price differentials within and between these submarkets. ibid., p. 144

The warning from their paper is that without measuring discrimination too broadly leads to incorrect inferences on the extent of discrimination and prejudice in housing markets

[234]Been *Journal of Land Use & Environmental Law 11 [1995]*, p. 21-22.

3.5.3 Discrimination in Enforcement

The copious literature documenting the early rise of the environmental justice movement in the U.S. points clearly toward a connection between certain groupings and environmental damage. That connection was not significantly strong enough to convince the courts to view it as discrimination, however. The number of cases, combined with the magnitude of the outcry, help to move the discussion here along, as does another famous environmental justice study.

The National Law Journal (NLJ) and authors Lavelle and Coyle uncovered another form of environmental discrimination in 1992–that of unequal *enforcement* of environmental regulations and penalties. Their analysis of environmental lawsuits in the seven years proceeding 1992 showed that[235]

1. Violations of environmental regulations in areas having the greatest relative white population were a staggering 500% higher than the penalties assessed at sites in minority neighborhoods.

2. The relationship between penalties and racial demographics is not mirrored when one looks at the relationship between areas of similar income and penalties. The difference in penalties between areas with the lowest median incomes and the highest median incomes was a mere 3%.

3. Hazardous waste sites listed under the relatively young Superfund initiative took 20% longer to reach the National Priorities List if they are in areas of minority concentration.

4. Cleanup efforts for Superfund sites led by various regional EPA programs begin 12% to 42% slower in minority areas than the startup times in majority areas.

5. The EPA chose the less expensive—and less desirable from the point of the citizens and under the law—option of "containment" of waste areas rather than the more expensive treatment and elimination of wastes more often at minority sites relative to white areas.

The stark statistics made for high-octane fuel to the early environmental justice movement. The evidence of disproportionate exposure to environmental burdens had limited success finding evidence of active racism causing the

[235] cf. Lavelle/Coyle.

overarching phenomenon, but the evidence from Lavelle and Coyle's study seemingly could only stem from underlying racist animus.

The evidence presented drew some strong critics, just as in the spatial studies. For instance, while it certainly highlighting the most eye-catching comparisons, it did not include data tables with all relevant comparisons, as would appear in a reviewed statistical work.[236] Furthermore, the continued use of Zip Codes (postal codes) to define boundaries reflect choices made for the efficiency of the postal service and do not demarcate "homogeneous socioeconomic communities."[237] There is, after all, "a great deal of geographical variation in [the US] that has nothing to do with injustices perpetrated by society on any given socioeconomic group."[238]

So while, again, informative, Lavelle and Coyle's study and for much of the early environmental justice research data proved not always to be a friend. As Bleich[239] notes, collecting racial data has pros and cons.

> "While openly recognizing race through ethnic monitoring can produce benefits for society, it can also cause confusion and give rise to misdirected actions. Racial and ethnic data that reveal group-based differences do not by themselves demonstrate the significance of race or the existence of racism. Such differences may be explained by a host of other factors, ranging from incomplete language acquisition by immigrants, to socioeconomic disparities that happen to overlap with ethnicity (but are not caused by racism), or

[236]There is always the possibility too that a hazard listed in a database is also spatially inaccurate, something that Susan Cutter found in almost 60 percent of EPA databases on South Carolina. Cutter.

[237]Monmonier, p. 5 The are also larger than census tracts and thus inherently more diverse. With large areas like ZIP codes, it is entirely possible to have a sufficiently large minority population within the boundaries, but also for them to be clustered the farthest distance possible from the polluter.This had to do with census tract data, however, and so the magnitude is not applicable directly to the ZIP debate. Hence, the data analysis will tag that area as minority area near a polluter, even though a case-study type approach (a vignette clearly reveals the opposite. See also Cutter. *compare* Barry, p. 77; "Anyone who lives in Manhattan and looks at a map of zip codes will instantly recognize that they are drawn up to make life easy for marketers by demarcating each zip code area so that it is as economically and ethnically/racially homogeneous as possible." Likely, the New York city anecdote does not generalize across the US to the level necessary to utilize the postal codes in general as ethnic demarcations.

[238]Bowen, William M./Wells, Michael V. The Politics and Reality of Environmental Justice: A History and Considerations for Public Administrators and Policy Makers. *Public Administration Review*, 62 Nov/Dec 2002, Nr. 6, p. 693.

[239]Bleich, Erik *Race Politics in Britain and France: Ideas and Policymaking since the 1960s.* Cambridge: Cambridge University Press, 2003, p. 207.

> even to statistical anomalies. [...] Ethnic data may be seized upon as evidence of racism without adequate digging into the meaning of the statistics."

Further, it is not even clear in all cases where boundaries between race and ethnicity, or even social classes are. Spatial segregation plays a part, but not all countries enjoy the luxury of space. The US does have strong spatial segregation, but in Europe, majority working classes are often integrated in space with minorities thanks to the urban constraints.[240]

The criticisms highlight some worthy concerns, revealing several factors which mitigate the starkness of Lavelle and Coyle's statistics but do not point away from the conclusion that environmental burdens tilt toward certain groups in society.[241] They do point to the conclusion that existing legislation will find it difficult to address environmental justice concerns, however. Lastly, and ironically, urban populations access to clean, treated, city water through existing piping systems can slow down cleanup efforts.[243] As significant risks from polluted urban sites comes from seepage of contaminants into the ground, and then into the ground water, populations which depend on the groundwater directly for drinking get on the faster track for cleanup than populations which can mitigated exposure by appealing to city water sources.[244]

Again, those with concerns about the distribution of environmental burdens find plenty to worry about without finding compensating benefits. Here too we see very clearly a potential weakness for even well-intentioned regulation.

[240] Laurian, p. 59.

[241] Other criticisms include that many minority areas in the study's sprawling database are urban. Urban waste sites are smaller than rural and suburban sites, and therefore automatically give less area for a polluter to damage. The extent of damage done affects the calculation of the fine.Lavelle/Coyle, p. S6. Furthermore, the EPA's goal in assessing fines is to compel compliance. Hence, they take into consideration the infringing firm's ability to pay. For smaller facilities or facilities in "economically depressed areas"ibid. small fines can achieve the same results as large fines. One final mitigating factor is that the EPA does not decide all penalties directly. A small percentage[242] are decided in court litigation. Hence, the EPA does not always have control over the final outcome, although the percentage of these cases was rather small.

[243] See, for instance, the situation regarding the Altgeld Gardens community in Chicago at Hill *Environmental Justice: Legal Theory and Practice*, p. 76-79.

[244] As only 18.4% of Superfund sites at the time were in urban areas, where access to clean water can be a "quick mitigation", this pattern could play into the revealed figures. However, fines levied under the Clean Air Act, Superfund, and Safe Drinking Water Acts in low income communities were higher than in wealthy areas. cf. Lavelle/Coyle . For more recent studies in the same vein, see Fletcher's (2003) thesis investigating New York State; Fletcher, Brian M *Environmental Equity or environmental discrimination: An assessment of hte New York State Inactive Hazardous Waste Disposal Program.* Ph. D thesis, State University of New York at Binghampton, 2003

The control exerted via regulation is still with human hands and subject to choices. While it is again unlikely that these choices are demonstrably racist in intent, it nevertheless shows another pattern of a lumpy environment—this time the regulation of that—and here again it is tilted towards an already disadvantaged group. Lavelle and Coyle's study also serves as an introduction to more subversive forms of discrimination which collectively act to keep pressure on certain groups. Lavelle and Coyle specifically noted the exacerbated problems that low property values lend to minority and low-income mobility populations.[245] As property values sink due to encroaching development, the most significant bargaining chip and leverage held by many minorities—their land ownership—also disappears.[246] The lowered property values around the environmental burdens is exacerbated by the relatively higher, untouched land prices, locking the minorities into their current situation lending a certain inertia to ownership that the law does not take into account.[247] Although this is not a hard and fast rule, and situations of property values bouncing back or even appreciating are known.[248] Above and beyond the environmental problems themselves, then, their collective impact factors in to questions of mobility among affected classes.[249]

In conclusion then the study represented a milestone and additional cumulative evidence, if not statistical proof, toward the overarching environmental justice conclusions that "global inequalities... are ... highly correlated with

[245]Note that damage to property values could be evidence of discrimination falling within purview of Title VIII (Fair Housing Act). Discussed infra at Section 5.4.2. See *Cox v. City of Dallas*, 430 F.3d 734 (Fifth Cir. 2005).

[246]The devaluation of land as a principle asset also plays a role in the uneasy ethical sense of a "taking" from a single individual for the proposed greater benefit of society. For U.S. blackletter case law see this topic discussed in *Bove v. Donner-Hanna Coke Corporation*, 258 N.Y.S. 229. June 29, 1932.

[247]Brion, Denis J. An Essay on LULU, Nimby, and the Problem of Distributive Justice. *Boston College Environmental Affairs Law Review*, 15 1988, p. 475. The U.S. Supreme Court does recognize zoning as a potential taking, establishing criteria for when it is an is not permissible. See *Agins v. Tiburon,* 447 U.S. 255 (1980); *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992).

[248]See Kiel/McClain. Also note reactions to the news of a LULU can be different than reactions to the site itself. Kiel, Katherine A./McClain, Katherine T. House Prices during Siting Decision Stages: The Case of an Incinerator from Rumor through Operation. *Journal of Environmental Economics and Management*, 28 March 1995, Nr. 2

[249]E.g. Katz, Lawrence F./Kling, Jeffrey R./Liebman, Jeffrey B. Moving To Opportunity In Boston: Early Results Of A Randomized Mobility Experiment. *The Quarterly Journal of Economics*, 116 May 2001, Nr. 2; Kiel, Katherine A. The Impact of House Price Appreciation on Household Mobility. *Journal of Housing Economics*, 3 June 1994, Nr. 2; Boehm, Thomas P./Ihlanfeldt, Keith R. Residential Mobility and Neighborhood Quality. *Journal of Regional Science*, 26 May 1986, Nr. 2. Also see for an illuminating discussion on lower-income mobility within constraints, Katz/Kling/Liebman.

global racial inequalities."[250] The cumulative nature of race an inequality comes from studies showing the correlation across a plethora of sociological indicators, an expanded palette of causality and spaces through which that causality operates.[251]

> "Pick any relevant sociological indicator—life expectancy, infant mortality, literacy, access to health care, income level—and apply it in virtually any setting, global, regional, or local, and the results will be the same: the worldwide correlation of wealth and well-being with white skin and European descent, and of poverty and immiseration with dark skin and 'otherness.' [There is a ... planetary correlation of darkness and poverty."[252]

Lavelle and Coyle's study in particular shows a weak safety net. And if it is unlikely to engage the U.S.'s anti-discrimination machinery toward change, perhaps advocates could address the continued shortage of minorities in U.S. political power positions, a shortage which plays a further enabling role for limited minority mobility and ability to change.[253]

3.5.4 Emergence of Grassroots Organizations

More evidence for the widespread feeling of environmental injustice comes from the Grassroots organizations which grew in response to the problems. In addition to the Northeast Community Action Group, which started to prevent the Southwestern Waste Management Corporation's landfill in 1979 new organizations began in response to both local problems and the feelings which fed from the legal actions and research.[254] These organizations championed local

[250] Pellow, p. 42.

[251] Walker.

[252] Winant, Howard *The World is a Ghetto: Race and Democracy since World War II.* New York: Basic Books, 2001, p. 305, from Pellow, p. 42

[253] Mohai/Bryant.

[254] Bowen cites examples extending back into the early 1970s, including a note that the President's Council on Environmental Quality (CEQ) brought up the issue of distributional equity and socioeconomic ties in 1971. Bowen *Environmental Justice through research-based decision making*, p. 7. See too The Mothers of East Los Angeles, founded in 1979, the People for Community Recovery was founded in 1984 in Chicago, founded in the Altgeld Gardens housing. See Boerner/Lambert, p. 62–63, Bullard *The Quest for Environmental Justice*, p. 19; also Hill *Environmental Justice: Legal Theory and Practice*, p. 76-79. Note also the seminal Piven, Frances Fox/Cloward, Richard A. *Poor People's Movements: Why They Succeed, How They Fail.* Pantheon Books, 1977, and West Harlem Environmental Action (WHEACT). Some recent treatments on the grassroots movement and continued application

environmental causes at a time when the mainstream environmental groups were focused more on nature and wildlife preservation.[255] These are the first branches of the environmental justice-grassroots movement, following on the similar grassroots outcry which arguably gave birth to US-environmentalism following Rachel Carson's *Silent Spring*.[256] More to the point, these groups grew *because* it was being recognized that minorities, and in particular, blacks, had been left out of the mainstream environmentalist movement that began in the U.S. in the 1960s and 1970s.[257]

The need to create new organizations at a time when environmentalism was already sweeping the United States is notable in and of itself. If showing patterns of inequitable environmental distributions was not enough to motivate the urban populace, showing that no one was doing anything about them certainly did. The incomplete project of civil rights in the U.S. certainly left substrate which could catalyze a movement. The more examples which came to light, such as landfill siting cases, minorities exposed to more pollutants in their jobs, and lack of action to complaints, the more the patterns viewed in summation took on racist tones.[258]

---

can be found in Checker, Melissa *Polluted Promises*. New York University Press, 2005, with relation to Hyde Park , in the state of Georgia. Further Sze, Julie *Noxious New York*. MIT Press, 2007, discussing locations inside New York City.

[255]For a discussion of this and other theoretical reasons—including empirical support—why the early environmental movement neither caught the attention of nor actively recruited black participants see Taylor, D. E. Blacks and the environment: Toward an explanation of the concern and action gap between blacks and whites. *Environment and Behavior*, 21 1989. Also Bullard/Wright; Mohai/Bryant; Baugh. Notably, a 1971 Sierra Club member survey which asked if "the Club should concern itself with the conservation problems of such special groups as the urban poor and ethnic minorities?" Fifty-eight percent of the club was opposed or strongly opposed to the idea. Cole, Luke W. Empowerment as the Key to Environmental Protection. *Ecology Law Quarterly*, 19 1992, p. 19

[256]Carson, Rachel *Silent Spring*. Boston: Houghton Mifflin, 1962 (2002), p. xviii, Preface by Linda Lear

[257]As Joan Martinez-Alier points out, environmental justice is a third current of environmentalism which

> "is not a sacred reverence for Nature [preservation] but a material interest in the environment as source and a requirement for livelihood; not so much a concern with the rights of other species and of future generations of humans [conservation] as concern for today's poor humans. It has not the same ethical (and aesthetic) foundations of the cult of wilderness. Its ethics derive from a demand for contemporary social justice among humans."Martinez-Alier, p. 11

[258]Baugh, p.187-88 Also noted in the literature were the contemporaneous Love Canal and Time Beach environmental scandals, which exposed the lax practices of corporations in their hazardous waste disposals and brought the widespread problem to popular concern. The two cases are notable in U.S. environmental history as playing a large role in the creation of CERCLA, or Superfund, legislation. Although neither of the two sites are cited as discriminatory incidences, the U.S. government's response to these was contrasted with

It was in the 1990s then when the movement had generated enough research in a similar vein and with related conclusions to codify its goal of changing the distributions of environmental quality. But the codification under the grassroots organization-rubric brought not only energy but forced a phase-change, moving beyond a narrow focus on the environment to include the problems inherent in changing the environmental distributions. This includes political dynamics, the legal loopholes or high-hurdles discussed above, and in general instances where any group could arguably be said to be lacking in power and influence relative to the spheres with which they were concerned.[259] The broader focus brought more political notice[260], and corporate involvement.[261] The environmental justice movement was off and running with a focus on removing the environmental burdens which so often were thrust upon a segment of U.S. society least able to deal with them.

3.6 Europe and Distributed Environs

With the place of environmental justice inquiry seemingly cemented in the U.S., the reader may be wondering what the state of environmental justice is in Europe. First and foremost, and while there are parallels to the U.S. literature, the European take on environmental justice has been much more focused on the social aspect as opposed to the racial aspects.[262] The environmental justice discourse within Europe—separate from the EHR discussion in the ECtHR discussed in Chapter 4—also takes a top-down approach to change, in contrast to the grassroots organization of the U.S.[263]

its arguably less speedy response to similar cases in minority and poor cases. See Bullard/ Wright, p. 75-78

[259] Cutter.

[260] By the mid 1990s twelve US States had environmental equity bills passed. Oakes, John Michael/Anderton, Douglas L./Anderson, Andy B. A Longitudinal Analysis of Environmental Equity in Communities with Hazardous Waste Facilities. *Social Science Research*, 25 1998, Nr. 2

[261] Bowen *Environmental Justice through research-based decision making*, p. 8.

[262] Elvers/Gross/Heinrichs.

[263] Ibid., p. 841; Agyeman, Julian/Evans, Bob 'Just sustainability:' the emerging discourse of environmental justice in Britian? *The Geographical Journal*, 170 June 2004, Nr. 2, p. 155. Note however grassroots environmental action in the Netherlands. Leroy, Pieter/Nelissen, Nico *Social and Political Sciences of the Environment: Three decades of research in the Netherlands*. International Books, 1999; giving a brief overview of the Dutch environmental movement in general from a social mobilization perspective. Also see the contemporaneous, although perhaps unlikely at the time to have been inspired by the U.S. environmental justice movement, example of a social movement to prevent poor or uniformed siting as in Krasnodar, southwest Russia, where activists caused the cancelation of a power plant.

It should be no surprise given our discussion of the economics of environmental distributions that one finds distributions of environmental goods skewed toward the hypothesis of environmental inequity on other continents as well. The outcome in the U.S. after all did not turn on any special aspects of their economic or political systems.[264] After all, the predictions rely only on shared market economics for assumptions, and therefore should play out similarly in related countries. There are, of course, differences too. Consider for instance how economic activity in Europe is less concentrated geographically than in the US.[265] The lower concentration in Europe also comes, perhaps counter intuitively, with larger differences in incomes across European regions than across US States. The patterns are not identical, but can be explained with the same concepts. Globalization, standardization, and the European Common Market all help to bridge the conclusions on distributions detailed above to the European setting. They also help to bring environmental justice concerns across too.

Indeed, studies have found evidence of environmental inequity in France, Canada, the UK, Australia, New Zealand, Germany, the Netherlands, Eastern Europe, and South Africa.[266] As the market mechanisms detailed above, how-

Keller, Bill Soviet Scraps a New Atomic Plant in Face of Protest Over Chernobyl. *New York Times* January, 28 1988

[264]For measurements in countries as politically different as Sweden supporting a regressive distribution of environmental quality, see Hökby, Stina/Söderqvist, Tore Elasticities of Demand and Willingness to Pay for Environmental Services in Sweden. *Environmental and Resource Economics*, 26 2003

[265]Puga, p. 375; Approximately one-half of the US's industrial employment is concentrated in just 14 States. Further, these 14 States cover only 13% of the US's surface area with about 1/5th of the population. As contrast, by the turn of the millennia, income differences across member states in the EU had fallen, but disparity within states, that is, between national regions, rose. ibid., p. 374,376

[266]cf. Laurian; citing studies by inter alia: Arcioni, Elisa/Mitchell, Glenn Environmental Justice in Australia. *Environmental Politics*, 14 2005, Nr. 3; Köckler, Heike Coping Strategies of Households Exposed to Unequal Environmental Quality in Germany. In Paper for the 4th Global Conference Environmental Justice and Global Citizenship: Environments, Sustainability and Technology. Oxford, July 2005; Buzzelli, Michael et al. Spatio-temporal Perspectives on Air Pollution and Environmental Justice in Hamilton, Canada 1985-1996. *Annals of the Association of American Geographers*, 93 2003, Nr. 3; Pearce/Kingham/Zawar-Reza; Agyeman/Evans; Lloyd-Smith, M E/Bell, L Toxic disputes and the rise of environmental justice in Australia. *International Journal of Occupational Health*, 9 2003; Kruize, Hanneke/Bouwman, Arno *The Distribution of Benefits and Costs of Environmental Policies: A Case Study on the Distribution of Environmental Impacts in the Rijnmond Region, the Netherlands.* Utrecht, 2003 – Technical report; Varga, Csaba/Kiss, István/Ember, István The Lack of Environmental Justice in Central and Eastern Europe. *Environmental Health Perspectives*, 110 November 2002, Nr. 11; Mitchell, Gordon/Dorling, Danny An environmental justice analysis of British air quality. *Environment and Planning A*, 35 May 2003, Nr. 5; McDonald, David A. *Environmental Justice in South Africa.* Ohio University

ever, can be assumed to operate the same across the Atlantic, at least in the broad strokes with which we will paint the European economic landscape, and the further the studies cited come to the same conclusions that are painting a picture of a tilted-burden world, we can focus on just a few examples.

The decreased less emphasis on bottom-up economic mechanisms to curb or control environmental pollution in Europe though deserves some mention. Because of the commercially connected, but as of yet politically decentralized continent, less policy can be implemented at regional levels. This has to do with the complexity of incorporating fiscally neutral environmental policies into the European Union.[267] Economic policies attack environmental problems through taxes, subsidies, and tradable permits. Implementation of any of these "involve questions of both national and [European] Community Law."[268] National legislatures cannot impose their own desired taxation or other push/pull mechanisms to achieve desired environmental goals as they invariably impact trade and the single market. And despite the *Danish Bottles* judgment,[269] which allows certain limited derogation of the zero trade barriers for environmental protection, the allowances are still very low. So low, in fact, that even arguably very environmentally beneficial programs such as the German voluntary scheme of common packaged good recycling are scrutinized and not free from the possibility of being closed out by the ECJ.[270] As the single market is the foundation of the collective Europe which we focus on in this study, we cannot delve into the intricacies of the European Union's environmental law. But that is not required for this chapter to make its point. The free movement of goods allows, at least at this level of abstraction, to connect with the knowledge that economic activities will tend to cluster or agglomerate, with all the potential concomitant environmental justice problems.

Despite the parallel concerns, the flood of research which took place in the United States from 1984 through the 1990s did not find as captive or debate-ready an audience in Europe interested in repeating the studies. There were some, however, which pointed in the same direction. The UK's Environment

Press, 2002

[267] Bothe, Michael; Bosselmann, Klaus/Richardson, Benjamin J., editors Chap. Economic Instruments for Environmental Protection: Introduction to the European Experience In Environmental Justice and Market Mechanisms. Kluwer International, 1999. Note at the time this paper was written this was the European Community, now, after the ratification of the Treaty of Lisbon, under the title of the European Union.

[268] Ibid., p. 253.

[269] Commission v. Denmark (Danish Bottles) Case 302/86

[270] Ibid., p. 255.

Agency conducted correlation studies of social status and landfill sites.[271] In France, Laurian found a simple but high correlation between population and waste disposal sites relative to least populated towns.[272] Similar outcomes exist for the towns with the largest proportions of residents born abroad, although France does not collect statistics based on ethnicity as the U.S. does. Therefore, breakdowns other than country of origin are often impossible.[273]

It appears though that instead of aiming to repeat the research pathways attempted in the American literature, different entities in Europe sought to incorporate the concept of environmental justice into their existing agendas.[274] For example, in the UK, we see a tight connection between the philosophy of environmental justice and the emerging policies of sustainability.[275] A connection between various philosophies of "equity" and sustainability has found growing support in international documents as well,[276] moving directly from environmental justice's roots to its newer expanded version[277] and skipping over some of the empirical debates.

In Germany, there is a growing core of research linking the empirical sciences of epidemiology and the demographics of risk via environmental exposure and the philosophy of environmental justice,[278] in addition to the equally

[271]See Environment Agency. 2002. *The Urban Environment in England and Wales: a Detailed Assessment.* Environment Agency. Bristol.

[272]Laurian.

[273]See Bleich *Race Politics in Britain and France: Ideas and Policymaking since the 1960s*.

[274]Elvers/Gross/Heinrichs; Agyeman, Julian *Environmental Justice: From the Margins to the Mainstream.* Town and Country Planning Association, 2000

[275]Inter alia Walker, Gordon/Bulkeley, Harriet Geographies of environmental justice. *GeoForum*, 37 2006 and the Institute for Environment, Sustainability and Regeneration at Staffordshire University, http://www.staffs.ac.uk/schools/sciences/geography/links/IESR/home.htm. Also see Chalmers, Helen Policy Profile: Addressing Environmental Inequalities through UK Research and Policy. *European Environment*, 15 2005; Agyeman/Evans; and Ruhl, J B The Seven Degrees of Relevance: Why Should Real-World Environmental Attorneys Care Now About Sustainable Development Policy? *Duke Envtl. L. & Pol'Y F.* 8 1998 for a general note on how sustainable development bleeds into environmental justice literature, and vice versa.

[276]See, Commission of the European Communities (CEC) 2001. *A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development*, Communication from the Commission (2001), Brussels.

[277]I.e. Holifield/Porter/Walker

[278]See, inter alia, Elvers/Gross/Heinrichs; Kohlhuber, Martina et al. Social inequality in perceived environmental exposures in relation to housing conditions in Germany. *Environmental Research*, 101 2006; Kuckartz, Udo/Rheingans-Hans, Anke *Trends im Umweltbewusstsein.* VS Verlag, 2006;Kunst, Anoton E. et al. Trends in socioeconomic inequalities in self-assessed health in 10 European countries. *International Journal of Epidemiology*, 34 2005; Bolte, Gabriele/Mielck, Andreas *Umweltgerechtigkeit.*

important issue of whether environmental *protection* measures are financed disproportionately by different social groups, contributing inequitable financial burdens to those who already statistically more likely to be bearing the environmental burden itself.[279] The German literature still lags behind the more developed UK literature though,[280] and other country's works tail off behind the two leaders.

But the recent move toward "sustainability" or health dialogues across countries does not by any means exclude what could be called "traditional" environmental justice conversations. In fact, some commentators have suggested that "[g]iven the problems in defining sustainability, and the lack of targets for resource consumption reductions in developed countries... [environmental justice] provides an alternative discourse..."[281] The quote summarizes the feeling, illustrated at longer lengths with the U.S. literature, that focusing on the environmental criteria quickly leads to substantial roadblocks. Getting members of the still-young European Union to agree to targets on sustainability or reductions in use will not be easy; and that is not only a matter of political will. The grounding of the single market in the Union creates a minefield for environmental policy. But if it is truly environmental betterment that the Community desires, it may be achievable through environmental justice criteria, instead of environmental regulation.

It is though the absent of examples in the European context which echo the American undertones of racism that must be noted. Whether explicitly stated[282] or not, the topic of environmental injustice or the phenomenon lead-

Die soziale Verteilung von Umweltbelastungen. Juventa, 2004; Maschewsky, Werner *Umweltgerechtigkeit-Gesundheitsrelevenz und empirische Erfassung*. Hamburg, 2004 – Technical report. For for Europe-wide discussion on health inequality Kunst et al.. See also early notes on the interaction between environment and society, illustrating early concerns in the topic, in the Netherlands discussed by Tellegen, Egbert/Wolsink, Maarten *Milieu en samenleving: een sociologische inleiding*. Leiden, 1992. For broader references on the growth of interdisciplinary literature between social, political, and environmental sciences in the Netherlands see Leroy/Nelissen. Also see comments on central and eastern European health/environment linkages in Hertzman, C. *Environment and Health in Central and Eastern Europea*. World Bank, 1995.

[279] Kloepfer, Micheal *Umweltgerechtigkeit. Environmental Justice in der deutschen Rechtsordnung*. 1st edition. Duncker & Humblot, 2006.

[280] Elvers/Gross/Heinrichs, p. 841.

[281] Quoted in Todd, Helen/Zografos, Christos Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland. *Environmental Values*, 14 November 2005, Nr. 4, p. 485, paraphrasing from conclusions of Eurig Scandrett. Specifically, Scandrett, Eurig Community Work, Sustainable Development and Environmental Justice. *Scottish Journal of Commnity Work and Development*, 6 2000

[282] As in Kloepfer, p. 21, noting the difference between American and German literature

ing up to an instance of injustice, is not examined as a potential piece of a racial trend in environmental decision-making.[283] Where racism is a problem—as against the Roma[284]—it is often directed at their way of life, which is a minority opinion on how to live.[285] As such, discrimination issues in Europe can emerge as situation of "traditional" minorities, in addition to "recent" minorities like immigrants.[286] The focus on immigration issues and ways of life though give the topic of "discrimination" in Europe a far different feel than the history of racism gives to discussions of discrimination in the U.S. The focus in Europe can therefore largely be classified as centered on social class.[287]

It is perhaps indicative of the difference in situations that even in the European Convention on Human Rights, perhaps the most developed Human Rights system in the world[288], there is only one reference to "minorities"; Article 14.[289] This article binds States to provide the rights contained in the rest of the Convention regardless of categories of association, such as race, religion, or "association with a national minority."[290] This protection, guaranteed in such a tremendous instrument, is quite reminiscent of the U.S. legal framework in the Equal Protection Clause.

Despite this uniting thread though there is far less common focus in the European environmental justice literature. That is not, however, to say that

---

and examples

[283]Kruize (p. 139,2007) notes this and the parallel US-based grassroots movement are absent in the Netherlands. Compare Leroy/Nelissen, who give a brief overview of the Dutch environmental movement from a social mobilization perspective.

[284]The Roma are a notable exception to the lack of racist overtones in Europe. See the European Roma Rights Center (ERRC) .

[285]The ECtHR does take into consideration that persons differently situated have a right to be treated differently in the protection of their rights. Note *Thlimmenos v. Greece* application no. 34369/97 judgment of 6 April 2000 and discussions below.

[286]Åkermark, Sia Spiliopoulou The Limits of Pluralism–Recent Jurisprudence of the European Court of Human Rights with Regard to Minorities: Does the Prohibition of Discrimination Add Anything? *Journal of Ethnopolitics and Minority Issues in Europe*, 3 2002, p. 8.

[287]Elvers/Gross/Heinrichs, p. 840. Again, see also the equally important issue of whether environmental *protection* measures are financed disproportionately by different social groups, contributing inequitable financial burdens to those who already statistically more likely to be bearing the environmental burden itself, similar to Lavelle and Coyle in Kloepfer.

[288]Gomien, Donna/Harris, David/Zwaak, Leo *Law and practice of the European Convention on Human Rights and the European Social Charter*. Council of Europe Publishing, 1996, p. 18.

[289]Åkermark, p. 1.

[290]Article 14, ECHR. See also the similar protection afforded in Article 1 of Protocol 12, and the treatment of aliens and nationals as separate groups in Article 16, and discussions in Gomien/Harris/Zwaak, p. 357

the European literature is somehow less coherent than the American. The multitude of viewpoints present in the rest of the world on what "environmental justice" means, however, "underscores a decentering of the United States as the geographical core of environmental justice...".[291]

Knowing that examples of environmental justice struggles across the Atlantic exist, and parallels in environmental justice literature exist, certainly supports the claim that similar economics drive similar environmental inequality concerns. One then needs to connect the distribution dynamics to a connection with a minority grouping. Consider statistics from the UK where one sees how the poor are twice as likely to live near polluting factories, and thereby are exposed to the worst air quality and most particulate matter in the UK.[292] In fact, the locales which house the most deprived 10% of the population there are five times as many sites and seven times as many emission sources.[293]. Such statistics are the hallmark of environmental injustice, the linkages that take predictions of distributed environs and connect them to a minority, just as demonstrated in the U.S. The following recent study, conducted in the Netherlands, helps to situate the European situation comfortably next to the picture derived of the U.S.

3.6.1 Disproportions in the Netherlands

Recent studies in the Netherlands have questioned how Dutch policy and culture in general have distributed environmental goods and bads among the populace. Similar to the U.S., the results do not lend to hard conclusions. They do, however, fail to speak against negative distributions. For even the most favorable study, where Coenen and Halfacre[294] did not find appreciable differences in the presence of polluting industries or noise levels among low-income locations and minorities, there was evidence of procedural inequity in that there was an "unequal distribution of measures on noise reduction, soil sanitation, and difference in maintenance and punishment for environmental contraventions."[295]

[291] Pellow, p. 79. As to widening viewpoints, written from a European perspective see Walker.

[292] Madden, Peter Escape from pollutionville. *The Guardian*, Society January 14 2004.

[293] Chalmers.

[294] Coenen, F. D./Halfacre, A. De verdeling van milieueffecten en milieurisico's over de Nederlandse bevolking als beliedsprobleem: 'Environmental injustice' in Nederland. *Beleidswetenschap*, 14 2000.

[295] Kruize, p. 41.

Similarly, Walda[296] found an equal exposure to high noise levels across socio-economic strata in the Rotterdam area. On the inequitable side, higher classes did live more frequently in quiet areas, implying that while the environmental "bad" of high noise levels was relatively equally distributed, environmental "goods" could cluster around more well off citizens. On the official front, the National Institute for Public Health and the Environment (RIVM)[297], found that older neighborhoods are often correlated with low-incomes, and also found that these areas were indeed built more densely and were more frequently found in areas near major roads where air-quality standards are exceeded, along with the noise levels that come with such pollution.[298]

Hanneke Kruize's[299] dissertation and publications stemming therefrom though has the most current and detailed pictures of environmental distributions in the Netherlands, and perhaps for all of Europe. Most notably, she incorporates in addition to environmental bads measures of access to environmental goods. The approach—as noted in other Dutch studies like Walda[300] and also in work in the UK[301]—allows for not only a picture of the distribution of burdens but the possibility of offsetting factors in environmental goods. In that sense, the picture contains more scope for revealing individual choice in environmental matters and hints at subjective perspectives on quality, as well as offering more parallels with geographical economics where push and pull dynamics can offset each other in the utility of consumers and producers.

The newness of measuring "goods" along with "bads" in the environmental justice canon is evident in the simple fact that there is no legal standards for access to green/clean areas as there are for protection against levels of certain pollutants. Kruize uses a rough measure contained in another Dutch study of 75 square meters per inhabitant within 500 m (a 5 minute walk) as the threshold for access to green space.[302] Such an inclusions is no doubt required for the

[296]Walda, I Bestaat er een verband tussen sociaal-economische status en blootstelling aan omgevingslawaai? *Geluid*, 2 2002.

[297]in Dutch: Het Rijksinstituut voor Volksgezondheid en Milieu

[298]RIVM *Milieubalans 2001-Het Nederlandse milieu verklaard*. Kluwer, Alphen a/d Rijn, 2001 – Technical report.

[299]Kruize.

[300]Walda.

[301]Mitchell/Dorling.

[302]Kruize, p. 44 and for discussion on the measurement Middelkoop, M van/Bruls, E J/ Golen, A J van *Rood en groen in balans: verkenning van groene normen en alternatieve benaderingen*. Foundation on Recreation, Knowledge and Innovation Centre, 2001. See, alsofor a discussion on the evolution of some standards, such as the broad rule of thumb "10 acres of recreation space per 1,000 population..." Ammons, David N *Municipal Benchmarks:*

future of investigation of environmental distributions. Kruize[303] discusses the anecdote that the spatial pressure in the Rijnmond region forced construction along the river itself. But the housing construction there has been of the more pricey variety. Despite the larger risks and the noise, it is a apparently a nice place to live—tradeoffs between perceived quality and actual quality exist and must be discussed, although research likely must delve into exposure and risk calculations lest they run afoul of moral critiques of allowing "environmental mercenaries."

In the Netherlands as a whole, Kruize finds that low incomes do tend to live in slightly worse environments than higher incomes. Furthermore, green space trends with income and highest incomes have access to twice as much green space as minimum incomes. Further, where legal standards are exceeded, it is most often the lower incomes who are worse off,[304] a fact reminding European readers of Lavelle and Coyle's critique of environmental enforcement.[305] The outcome is less surprising, even given the detailed economics introduction in this chapter, given the ignorance of policy makers to the possibility. In interviews with policy makers around the Rijnmond (Rotterdam harbor and the surrounding river areas) Kruize[306] found that

> "[m]ost of the informants had never actually thought about how environmental quality was distributed among socio-economic groups. Nor do environmental policy documents relating to the Rijnmond region make this distinction. [...] Policy is geared to the reduction of human exposure to environmental pollutants, especially at levels above the legal standards. It's focus is thus on environmental quality in general rather than on specific subpopulations."

If people are unaware of the possibility, how would one expect the problem to be fixed?

Assessing local performance and Establishing Community Service Standards. 2nd edition. Sage, 2001, p. 254-55, Chap. 19. For economic approximations of demand for open space, note Bates, Laurie J./Santerre, Rexford E. The Public Demand for Open Space: The Case of Connecticut Communities. *Journal of Urban Economics*, 50 July 2001, Nr. 1

[303] Kruize, p. 76.

[304] Ibid., p. 54-56.

[305] Section 3.5.3 For comments on delays in European enforcement, see Hedermann-Robinson, Martin Article 228(2) EC and the Enforcement of EC Environmental Law: A Case of Environmental Justice Delayed and Denied? An analysis of Recent Legal Developments. *European environmental law reivew*, 15 2006.

[306] Kruize, p. 73-74.

An important conclusion from this study is that it's rarely the environmental conditions that are the make-or-break decision for whether to move in or out of an area.[307] Environmental issues do not always—that is, one cannot support the assumption *a priori* that environmental pollution necessarily pushes individuals from an area—form a push factor. From the Dutch instances, note the correlation in areas between high incomes and noise pollution. The implication is that there are tradeoffs being created: environmental benefits are or can be traded for other benefits–location near roads or rail lines for benefit of transportation, perhaps.[308]

Another conclusions is that there does not appear to be a greater pressure toward inequitable distributions as one increases spatial pressure. Kruize[309] found that differences between socio-economic categories did not increase in regions with high spatial pressure, such as the Amsterdam Airport area and the greater Rotterdam city area. Here, both actual and perceived environmental quality was lower than the perceptions in the Netherlands as a whole, but the already-established clustering did not serve as a fulcrum enabling greater dispersion of environmental benefits away from the poor and toward the rich. Moreover, and perhaps most applaudable, even though lower incomes did have overall a greater exposure to various environmental bads than higher incomes, there was not significant evidence of *accumulation* of bads. That is, even in an area which did not achieve the legal standard for one measured pollutant, it did not simultaneously suffer under other environmental burdens. Of the measures included in the study, only 1% of Dutch homes were exposed to multiple "bads."[310] This is starkly contrasted with the case in the U.S., where the (EPA) has been strongly criticized for their failure to take into account aggregative risks in their permitting and standard-setting practices, leading to greater health concerns.[311] Even in the Rijnmond area, where the relative accumulation was the highest, it did not display a relationship with income. An

[307]Kruize, p. 79.

[308]It might interest the reader, especially the North American reader, to note that most rail lines in the EU are for commuter traffic. A mere 8% of goods transport occurs over traditional rail lines in the EU. In contrast, 40% (as measured by tons per kilometre) of transport goods go by rail in the US. Thus, when one discusses rail noise in Europe, there is higher probability that these are people transports, and not the heavily laden (and possibly diesel) locomotives. See Puga, p. 395.

[309]Kruize, p. 126.

[310]Ibid., p. 136.

[311]Lazarus, Richard/Tai, Stephanie Integrating Environmental Justice into EPA permitting authority. *Ecology L.Q.* 26 1999.

interesting side note to the Rijnmond story is that it is successfully decreased industrial emissions although industrial production has increased.[312] The requisite levels of air quality are impacted most not by industrial emissions but by traffic.

Kruize attributes the outcome to two potential explanations: the Dutch egalitarian mindset, and the overarching policy focus and goal of a better overall quality environment in the country as a whole. Of course, these are exposure measures and are not necessarily directly connected to risks and health outcomes. We know that lower pollution levels should be better for the human condition, but the tradeoffs between costs and benefits need more investigation through biologic and epidemiological studies for policy to be optimal and effective. Further, perceptions-measures, as used in this study, of environmental quality are not always aligned with reality, and therefore cannot be used as a "hard" proxy for exposure. Kruize[313] notes that although good air quality is perceived accurately to be good air most by high-income brackets, other categories of quality do not show a tight recognition-trend with income.

As public policy stands now in a position to retreat—both potentially in the Netherlands,[314] as sentiment moves away from egalitarian policy and toward libertarian, and already present in other developed countries such as the U.S.—we leave more room for the market. Policy lets go of the reins and relinquishes the outcomes to the choices of, among others, developers, industrialists, and in general private parties. Understanding the outcome is a function of the market, and must be understood before one discusses policy to change or retroact the outcome, and certainly before one dicusses questions of what *ought* to be. And although Kruize[315] found little in the Netherlands to indicate a pressing social problem from the limited differences in environmental quality between income brackets, we know that socio-economic "bads"—such as crime etc.—can accumulate in lower economic classes just as the potential for enviromental bads.[316] The picture we see when discussing the environmental quality is only one aspect of the distribution.

The important fact is to take note—explicitly—of the tradeoffs. The environment will be distributed unevenly here in Europe just as it was distributed

[312] Kruize, p. 74.
[313] Kruize, p. 117.
[314] Ibid., p. 76.
[315] Ibid., p. 150.
[316] Ibid., p. 148.

unevenly in the U.S. That lumpiness can have a multitude of impacts and the variety and magnitude of which can be investigated, again, like the U.S., in studies such as Kruize's.[317] The tilted environment can unfortunately still be most burdensome on classes of people least able to deal with them, even when magnitudes and lack of burden-agglomeration do not generate much cause for concern. That is, even the relatively ambiguous results of the Dutch studies do not show a tendency away from the injustices which brought environmental justice to the forefront of concern in the U.S. There can be multiple intervening factors which keep empirical studies from finding large reasons for concern, but as multiple equilibria are to be expected in economic geography models;[318] the observed is potentially one of several outcomes. With economics still tilting the environmental playing field, there needs to be some mechanism in place, in both the similar economies and environmental policies of Europe and the U.S., to protect against the environmental justice-outcome.

And this is exactly the type of problem that is best structured inside open debate, with access to legal scaffolding to structure the conversation. Until geographical economics or other policy work can adequately predict spatial outcomes and the impact of policy and changes on that outcome, a safeguard is called for. The demonstrable fact that the concerns of the U.S. environmental justice movement are reflected in Europe only strengthens the conclusion that to address the problem, one must work at the highest levels of policy.

3.7 Conclusions

The goal of this chapter was to illustrate the proclivity of economic systems toward, rather than away from, environmental equity. And while the environmental justice literature, read as a search for empirical verification of unjust environs around racial and socioeconomic groupings leads to several as-yet uncorrected criticisms, it does not lend any semblance of hope that a minority section of society will be able to avoid becoming the recipients of burdens. Society clusters its pollution, impacting a minority of the population to the benefit of a majority. This outcome, combined with the previous chapter's discussion of the democratic shortcomings which conspire to hamper a minority appeal against such inequity, leaves assurances that environmental justice will

[317] Kruize.
[318] Puga, p. 393.

need some help along the way.

This chapter presented only the core cases which launched the environmental justice movement, and expanded those with the precedents, economics, and legal history which contributed to them. There are many reference works available on the history of environmental justice in the United States which can expand on the foundations here.[319] The analysis here falls within the same lines as Bowen laid out when he reviewed the empirical literature of environmental justice nearly a decade ago; research cannot go forward on the belief that a large body of work establishes that well-defined, and indeed, mainly racially-defined minorities are disproportionately exposed to environmental hazards.[320] A far more defensible position, relative to "traditional environmental justice," is that

> "[a] fairly small and largely heterogeneous body of research hints or perhaps even indicated (but by no means demonstrates) that in some specific areas, some ostensibly identifiable groups in the population may in some instances live closer to some selected environmental hazards.[321]"

There is a cogent and constructive body of criticism, including Bowen's work, unfortunately remains largely unapplied while it should be read and understood by all embarking on empirical investigations of environmental burdens.[322] But it serves also as a summary of the reasons why the research to follow does not attempt to measure the incidence of environmental injustices or to define the spatial groupings which might cement measurement and definitions. Nor does it attempt to base new regulations or laws on any of the established empirical results, proceeding to defend or shore up any of their flaws. Instead, it moves decidedly and deliberately into a human rights agenda.

The weak view of "traditional" environmental justice literature does not slow the momentum toward an environmental-style human right. The chorus of criticism rests on weaknesses in pinning down a relationship between specific

[319] References such as Schlosberg, David *Defining Environmental Justice: Theories, Movements, and Nature*. New York: Oxford University Press, 2007; Bullard *The Quest for Environmental Justice*; Gerrard, Michael B./Foster, Sheila R., editors *The Law of Environmental Justice*. 2nd edition. American Bar Association, 2008; Foreman Jr.; provide ample room to begin.

[320] Bowen *Environmental Justice through research-based decision making*, p. 179.

[321] Ibid.

[322] Other prominent works include Liu; Davy.

groups and polluted environs. The work at hand takes that criticism to heart and finds the least contentious—and hence most supported—aspect of the traditional canon. That is, society must worry about a minority of its populace, a probable numerical minority whose voice will have trouble reaching the surface when and where their exposure to extra pollution occurs. This chapter needed only show the proclivity and back that up with empirical possibilities.

Nevertheless, the preceding analysis is necessary and prudent to establish lest the transition to human rights discourse seem arbitrary and biased, deriving itself from the emotional sense rather than the economic reality. One can of course conjure a human right for any perceived injustice in the world, of which there remain many. But there are abundant reasons for not reaching to that legal level unless necessary.[323] This chapter, and that preceding, gives the rationale why the environmental justice problem does ascend. At a minimum, it presents a reason external to advocacy for the jump into human rights territory.

The meta-conclusion of a survey of the environmental justice literature, both in the U.S. and in Europe and across disciplines from economics to law to sociology, must be then that there is substantial evidence of a concern among an under-served population within the electorate who have little or no legal protection nor legal remedy for their concerns.[324] Those concerns are driven by economic dynamics and therefore forces the analysis of the problems at a democratic level, a location where the spontaneous order created by the market can be checked. The law is not protecting a minority at the implicit behest of the majority, tilting the cost/benefit analysis toward those expecting benefits devoid of localized costs. To bring the costs to the majority, the minority has expended time and effort into utilizing existing methods ranging from civil rights litigation, asserting procedural rights, and creative usage of environmental regulation provisions. Their work thus far has come to little or no avail. The current situation forces the question of whether the system is functioning properly and whether the system has, intentionally or unintentionally, circumscribed justice. How then do we bring about environmental justice?

[323]Alston, Philip Conjuring up New Human Rights: A Proposal For Quality Control. *American Journal of International Law*, 78 1984.

[324]This is the outcry that Davy describes as the failure of the doctrine of efficiency in settling pollution siting questions. Davy

4 Human Rights and Environmental Protection: The European Experience

> If the misery of our poor be caused not by the laws of nature, but by our institutions, great is our sin.
>
> *Charles Darwin*

The previous chapters laid out the profound and confounding issues of environmental justice. The existing environmental justice research, and the now expanding work in sociology, political economy, and economics, show that there is no reason to expect the environment not to be tilted—potentially painfully—toward a minority of the population. This is again not necessarily the minority envisioned by "traditional" environmental justice—a racial or socioeconomically defined class of people. Rather, the least contentious aspects of theory predicts that environmental usage will cluster, bringing environmental degradation along with it and impacting a minority of the voting population (Chapter 3). Being this numerical minority they will not necessarily have recourse to stop the action, even with the potential for concomitant health impacts acting as momentum for extra legal pathways (Chapter 2). At worst, in cases where traditional environmental justice concerns are realized, and this minority is also a racial or socioeconomic minority, the power differential only becomes more burdensome and the glaring problem for modern democracies which early work brought to the public conscience.

It is the twenty-plus years of environmental justice research which grants evidence that such groupings do exist and find it an uphill battle to secure healthy environs. The economic and statistical work supports this direction-

ality, if not necessarily the magnitudes held up by the bulk of environmental justice research. The point following and motivating rights-based discourse flows from the fact that those affected have not been able to change their environmental lot in life, either through regulation, the democratic process or legal proceedings. Admittedly, the preceding discussion did not give evidence that the tilt could not be toward a powerful or wealthy minority, but that would not generate the concern, emotion, grassroots organization and democratic issues and spirited legal discussion we see in the copious environmental justice literature. Further, this work does not detail the parallel and ancillary role that regulation could have in protecting against the environmental problems labeled as injustices, the persistence of environmental justice problems themselves speaks to the point that they have not provided sufficient protection.[1] Despite all intervening policy then environmental injustice remains a failing of both democratic ideals and regulatory oversight, and one that is cemented in economic dynamics.

One can certainly view this situation as reaching a moral transgression, as much of the timbre of the literature would suggest. Then, we know that

> "[p]rofound moral issues demand a profound response from the law, and as we enter the twenty-first century, human rights is (at least at a rhetorical level) the law's best response to profound, unthinkable, far-reaching moral transgression. More fundamentally, it is the

[1] That is not to say the conversation is not worth having, especially in moving toward any explicit recognition of environmental rights or environmental justice rights within human rights (ECHR) or civil rights (US) canons. But for the work at hand, a comparison would not yet add much to the conversation. Especially because there is less emphasis on economic mechanisms to curb or control environmental pollution in Europe. Much of this has to do with the complexity of incorporating fiscally neutral environmental policies into the European Community. Implementation of any economaicly-tuned measures "involve[s] questions of both national and [European] Community Law." See, for discussion, Bothe, Michael; Bosselmann, Klaus/Richardson, Benjamin J., editors Chap. Economic Instruments for Environmental Protection: Introduction to the European Experience In Environmental Justice and Market Mechanisms. Kluwer International, 1999, p. 253. National legislatures cannot impose their own desired taxation or other push/pull mechanisms to achieve desired environmental goals as they invariably impact trade and the single market. And despite the *Danish Bottles* judgment, which allows certain limited derogation of the zero trade barriers for environmental protection, the allowances are still very low. So low, in fact, that even arguably very beneficial programs such as a German voluntary scheme of common packaged good recycling are scrutinized and not free from the possibility of being closed out by the ECJ. The U.S. however uses many more, and notably homogenized mechanisms including the Clean Water Act[2] (CWA), the Clean Air Act (CAA),[3] and the Comprehensive Environmental Response, Compensation and Liability Act[4] (CERCLA, also known as Superfund) among many others. Comparisons on the role regulations play for environmental justice across continents would have to be tightly structured.

> law's strongest condemnation of the exploitation of the weak by the powerful."[5]

As the preceding chapters show why the failings brings us to a level demanding profound change, this chapter is tasked with describing that profound legal response, and as such it stays within Sinden's definition that "the core function of human rights is to counteract gross imbalances of power in society..."[6]

The idea of or hope for an environmental human right (EHR), variably conceptualized as a right for all to a certain quality of environment (substantive rights) or a collection of claims to information, participation, and justice in decisions on the utilization of the environment (procedural rights), is not entirely young.[7] As far back as 1975, Anderson and Miller introduced the swelling sense of a need for a fundamental environmental right as

> "the inchoate sense that the 'law' should protect society against ultimate threats to survival has caused the public to seek reassurances that such a legal backstop does exist. The movement for an environmental bill of rights is the public's way of trying to codify a widespread public moral conviction (and not incidentally to reassure it) that the law will, somewhere, draw a line which will protect us all."[8]

From the breadth and depth of the environmental justice research and movement it is easy to conclude that the law has not thus far provided that backstop.[9]

---

[5]Sinden, Amy Climate Change and Human Rights. *Journal of Land Resources and Environmental Law*, 27 2007, p. 257.

[6]Ibid., p. 4.

[7]See, for example Gormley, W. Paul *Human Rights and Environment: The Need for International Co-operation*. A.W. Sijthoff, 1976. Also comments on an early Japanese movement toward rights-based protection in Nito, Hajime; Husimi, Kodi, editor Chap. A Legal Right to the Environment In Science for Better Environment Fundamental Rights and Environmental Quality: Proceedings of the International Congress on the Human Environmental. Pergamon Press, 1977. Also Anderson, Frederick R./Miller, Alan S.; Husimi, Kodi, editor Chap. Fundamental Rights and Environmental Quality In Science for Better Environment Fundamental Rights and Environmental Quality: Proceedings of the International Congress on the Human Environmental. Pergamon Press, 1977 and notes therein.

[8]Ibid., p. 825, notes in original

[9]In the case in the U.S., one can even claim that the claims of environmental justice have resulted in a dismantling of the backstops that did exist. See Gorod, Brianne J. The Sorcerer's Apprentice: Sandoval, Chevron, and Agency Power to Define Private Rights of Action. *Yale L. J.* 113 2004; Note After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement. *Harv. L. Rev.* 116 2003; Cody, Brendan South Camden Citizens in Action: Siting Decisions, Disparate Impact Discrimination, and Section 1983. *Ecology L.Q.* 29 2002, all discussing the removal of standing on civl rights grounds.

This research does not rely merely on public opinion to reach this level though. Again, it is the universality of the *evil* demonstrated through Chapters 2 and 3 working against requisite minority protections of a modern democracy which necessitates a rights-based legal mechanisms. The theory sits within the larger liberal tradition touched on in Chapter 1. It is decidedly not some universal characteristic of the right which causes its emergence. As Gray[10] explains, cementing this introduction and chapter's work with the liberal tradition in the prologue,

> [t]here can be no definitive list of human rights. Rights are no theorems that fall of theories of law or ethics. They are judgments about human interests whose content shifts over time as threats to human interests change. When we ask what rights are universal, we are not inquiring after a truth that exists already. We are asking a question that demands a practical decision: Which human interests warrant universal protection?

The distinction, while academic, is important to note at the outset in order to justify the placement of the discussion. As in the previous chapter, one must be careful to ask the right questions. Attempting to extricate an environmental human right from either philosophic considerations or existing treatises on human rights is a path well traveled.[11] Coming at the issue of environmental degradation via the environmental justice discourse however lends the different perspective examined here, and notably avoids—or largely avoids—the larger discussion for the time being.

After all, if the failures illustrated by environmental justice do demand a rights-based approach for full redress, there is already much legitimate concern in human rights (theory and practice) as to the creation of new rights,[12] and even the management of existing rights.[13] The concern for environmental

[10]Gray, John *Two Faces of Liberalism*. The New Press, 2000, p. 113.

[11]See, inter alia, Kravchenko, Svitlana/Bonnie, John E *Human Rights and The Environment: Cases, Law, and Policy*. Carolina Academic Press, 2008; Hayward, Tim *Constitutional Environmental Rights*. Oxford University Press, 2005; Hancock, Jan *Environmental Human Rights: Power, ethics and law*. Ashgate, 2003; Anderson, Michael R.; Boyle, Alan/ Anderson, Michael, editors Chap. Human Rights Approaches to Environmental Protection: An Overview In Human Righs Approaches to Environmental Protection. Clarendon, 1996

[12]Inter alia Alston, Philip Conjuring up New Human Rights: A Proposal For Quality Control. *American Journal of International Law*, 78 1984. Also van Lanen, J.J.M. Mensenrechten en milieubescherming: van een wankel evenwicht naar een sterk samenspel. *Nederlands Juristen Comité voor de Mensenrechten (NJCM)*, 24 Dec 1999, Nr. 8

[13]Notably, much concern on the role of Corporations or non-state entities in the human

injustice in the preceding chapters warrants, at the very least, a discussion about fundamental protection.

The goal of this chapter then is to first illustrate what protections at the fundamental rights level can and do exist and what forms they take (Section 4.1), followed by a concrete illustration of the existing protection using the established jurisprudence of the most advanced human rights instrument, the European Convention on Human Rights (Section 4.2). There is some mixing in the discussion of levels of law at this point. It is unarguable that the form of environmental protection or derivation of auxiliary protection will depend on the level of law at which it operates. As the goal of the research here is a first attempt at identifying the existing protections within the context of environmental justice, as opposed to the broader discussion of environmental protection or conservation proper, a more precise analysis of what each level means for the protection is left to later work. This is somewhat unfortunate as it limits the conclusions allowable here though. The truncation though is necessary for the scope of the project and the immediate needs of the literature.

Within those boundaries, the final section (Section 4.3) uses the theory and the practice to summarize the protection which does exist at different levels in the form of EHR and how that relates the protection needed by environmental justice. The outcome is heartening for advocates, and lends towards the positive discussion of utilizing the rights-based direction for environmental justice protection in general.[14]

4.1 Environmental and Human Rights

As there is currently no scheme in the world fully acknowledged as an "environmental right,"[15] research in this direction must explore the various categories

rights landscape. Alston, Philip; Idem, editor Chap. The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accomodate Non-State Actors? In Non-State Actors and Human Rights. Oxford University Press, 2005; De Schutter, O; Alston, Philip, editor Chap. The Accountability of Multinationals for Human Rights Violations in European Law In Non-State Actors and Human Rights. Oxford University Press, 2005 Also note Osiatyński, Wiktor *Human Rights and Their Limits*. Cambridge University Press, 2009, p. 43: "No international political mechanism exists capable of regulating the global economy and imposing rules of conduct on multinational corporations outside their home countries. Often, those of their activities that violate human rights wind up escaping the coercive power of any given state. As a result, traditional mechanisms for the protection of rights from abuse by private actors via instruments of national laws are inadequate."

[14] Also in specific, as is discussed in Chapter 5

[15] But see African Charter on Human and Peoples' Rights, Article 24 and p. 150

within the literature on what an EHR should and could—and perhaps glimmers of what one already does—look like. The discussion helps significantly in understanding the "derived and extracted" forms of environmental protection one sees flowing from existing human rights, such as is discussed in Section 4.2. Naturally one must discuss some general points regarding human rights to establish a common foundation. Perhaps most important for a discussion of EHR is the differences between substantive and procedural rights, and the aspects of negative and positive obligations contained in each.[16] Most introductions to EHR reveal these partitions of rights discussions along categorical grounds, including the substantive/procedural, negative/positive, and generations of rights. The partitions are generally overdone, however, and can be minimized here for want of focusing specifically on EHR specifically rather than HR generally.

Exploring the substantive and procedural aspect of fundamental rights is important, as noted, in helping to illustrate how environmental rights already exist in some forms in and between existing rights,[17] while understanding negative and positive obligations clarifies the duties placed on rights-givers as participants in governance. Also important, especially for an understanding of the ability of existing human rights protection to expand judicially in the European Court of Human Rights (ECtHR), is the history of major human rights documents. A full discussion on EHR could easily fill volumes though.[18]

[16]See, for instance discussion in Turner, Stephen J. *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers Toward the Environment.* Kluwer, 2009. Also for an introduction see Cameron, James/Mackenzie, Ruth; Boyle, Alan/Anderson, Michael, editors Chap. Access to Environmental Justice and Procedural Rights in International Institutions In Human Rights Approaches to Environmental Protection. Clarendon, 1996

[17]Most notably, in the European context, Gomien, Donna *Short Guide to the European Convention on Human Rights.* Council of Europe, 2005; DeMerieux, Margaret Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Oxford J Legal Studies*, 21 2001, Nr. 3

[18]Excellent introductions are available in Janis, Mark W./Kay, Richard S./Bradley, Anthony W. *European Human Rights Law.* 3rd edition. Oxford University Press, 2008; Nickel, James *Making Sense of Human Rights.* 2nd edition. Wiley-Blackwell, 2007; Steiner, Henry J./Alston, Philip *International Human Rights In Context.* 2nd edition. Oxford University Press, 2000, among others on human rights in general. More specific to environmental topics though is the established introduction: Anderson, Michael/Boyle, Alan, editors *Human Rights Approaches to Environmental Protection.* Clarendon, 1996. For recent additions and discussions, the see, inter alia, the books which collectively form a rough superset of the information collected and analyzed herein: Turner; Kravchenko/Bonnie; Boyle, Alan Human Rights or Environmental Rights—A Reassessment. *Fordham Envtl. L. Rev*, 18 2007; Hayward; Mowbray, Alastair *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights.* Hart Publishing, 2004; Hancock; Déjeant-Pons, Maguelonne/Pallemaerts, Marc *Human rights and the en-*

The introduction contained here is a bare minimum. The combination of language and history introduced here, when coupled with the leading example of the ECtHR, helps to illustrate why we do not yet have a codified right to the environment,[19] but nevertheless have been able to derived or extract certain protections simply from the existence of other, non-environmental rights.

4.1.1 Negative and Positive Rights

While the division of rights into negative and positive categories can today been seen as somewhat of a rhetorical rift, played out in political bargaining in the bipolar zeitgeist of the Cold War, it remains a useful pedagogical break. Granted, all fundamental rights share common characteristics, be they positive or negative rights. They all must be universal, definable in a justiciable form, clearly define who bears duties because of the them and spell out what institutions must be in place to carry out the guarantees.[20] These criteria place high hurdles on legal construction, if not also philosophical concerns, on all claims of rights.

In practice, it is negative rights which clear such hurdles with more ease. This is because negative rights are "freedom *from*" rights, predominately freedom from coercion.[21] Freedom of speech, freedom of religion, and rules concerning the sanctity of human life fall into this category. They are rights which exist without any further coaxing; they exist in the absence of coercion. Hence, the "right" comes from tying the hands of those who would seek to infringe these privileges.[22] The duty-holder is bound simply to keep their hands out, off, and away. Negative rights are rights that require prohibitions on those with the potential to act on an individual.

Negative rights stand in contrast to positive rights, or "freedom *to*" rights. These guarantee a positive right "to" a privilege. They are "positive" because they require activity—above and beyond establishing agencies and working

vironment. Council of Europe Publishing, 2002; Handl, G; Eide, A/Krause, C/Rosas, A, editors Chap. Human Rights and the Protection of the Environment In Economic, Social, and Cultural Rights. Kluwer, 2001; Steiner/Alston

[19] Also see Hancock; who argues that if existing human rights were properly enforced they would necessarily cover the area outlined by a basic substantive EHR.

[20] Beetham, David What future for economic and social rights? *Political Studies*, 43 1995, Nr. 4.

[21] Steiner/Alston.

[22] Also referred to as "abstentational requirements" cf. Gomien, Donna/Harris, David/ Zwaak, Leo *Law and practice of the European Convention on Human Rights and the European Social Charter*. Council of Europe Publishing, 1996, p. 379.

institutional structures—and not just hands off a particular area of individual life. Examples include the right to work, the right to organize, and the right to bargain collectively.[23] The outlays or "positive" activities required are clear in the case of the right to work; what steps does a government or other duty holder have to take to discharge the duty for all to work? Must they go in to debt to create public works projects when jobs are scarce? In the same sense, a right "to" environmental quality might very well force the duty-holder to go out and actively clean an environment, at their cost, which has fallen below the metric set as "quality." In that sense, positive duties can also create functional limits on private conduct like negative rights, because foresight of the problem can prevent action today.[24] There is then less difference between the types of rights as might be indicated at first glance.

Commentators have recognized this in noting that while environmental rights are usually treated as "second generation" positive rights, their existence in full form would be a functional negative right. More specifically, the positive nature of the right though does not always imply a correlative positive duty. Unlike the positive, goal-oriented, proposed rights to healthcare, work, education, or welfare, which do not exist at all without creating them, a "natural" environment is the de facto state of affairs. It is human involvement which by in large is the culprit for changes there. Thus, the correlative duty of an EHR is, in most case, a *negative* duty to refrain from interfering with the "natural" order.[25]

The debate is both theoretically deep and tangible in practice. Hayward notes that most modern constitutions have an explicit or implicit reflection of the political/social, negative/positive rights dichotomy.

> "The chief difference between the two sets of rights is that the former are taken to be directly justiciable individual rights whereas the latter are normally interpreted more as manifestations of political programmes and are not necessarily directly enforceable by courts."[26]

[23] Articles 6, 7, 8. of the International Covenant on Economic, Social, and Cultural Rights. See below Section 4.1.3

[24] Here is a direction for further legal research in operationalizing the conclusions in this thesis. Composing a positive right to the environment, derived or otherwise and its concomitant effects on private liberty, needs examination and elucidation.

[25] Hayward, p. 49.

[26] Ibid., p. 78.

The view illustrates why positive rights also are often collectively referred to as welfare rights and encompass most conceptions of an environmental right; protecting the environment will require the expenditure of resources not currently allocated in that direction. Most conceptions of a right to the environment would impose an obligation on a State to provide a certain level of environmental quality. Even if requiring only procedural access to environmental decision making currently not available to citizens, the right remains a positive endeavor by the State.

This bifurcation may be a bit of a caricature though, as it is now well established that all rights require some form of positive outlays, be that monetary or in the form of institutional structures.[27] After all, freedom to own private property not only presuppose a government who refrains from coming to take one's property, but the bureaucratic structures that exist to register property and the police power to enforce the right against those who choose to ignore its power. Hence, authors have noted that the boundary between positive and negative rights is quite blurry[28] and far from bright line boundaries of "hands off" versus "hands on." In the main, the argument is that "*all* human rights require governments to take costly actions."[29]

Despite the blur, the picture here is useful in the sense that many structures which support negative rights already exist as part of the foundation of democratic states and therefore the largely financial outlays are already in place; they only need to continue running and, indeed, keep the government from encroaching, a feat which does not require extra money. Extra requirements come with political costs, costs that must be born by political will. Hence, discussions on new rights which fall into the positive-obligations territory trigger concern and arguments which keep them from being, in many senses, as accepted or implemented as negative rights.

[27] Hancock; Holmes, Stephen/Sunstein, Cass *The Cost of Rights*. W.W. Norton & Company, 1999.

[28] Shue, Henry *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*. 2nd edition. Princeton: Princeton University Press, 1996.

[29] Hertel, Shareen/Minkler, Lanse; Hertel, Shareen/Minkler, Lanse, editors Chap. Economic Rights: The Terrain In Economic Rights: Conceptual, Measurement and Policy Issues. Cambridge, 2007, p. 10, (emphasis in original), notable examples include the right to be free from slavery, a right usually cast with the right to life as unambiguously negative (freedom from) in its obligations on states, still requires resources on the part of the state to keep others from engaging in slavery. Expenditures include obvious tasks such as policing, labour inspections, and the like.

4.1.2 Substantive and Procedural Rights

A reader from outside legal fields may already notice that the simple term "environmental right" is, like its "environmental justice" cousin, not clearly defined. The term as used here so far expresses the idea of a human right encircling environmental issues, but authors have proposed a cornucopia of conceptions, including a right to a quality of environment, a right to a clean environment, a right to a decent environment, a right to a viable environment, a right to a sustainable environment, and a right to a safe environment, to voice a sampling.[30]

Note the form of all of these listed rights. They all guarantee a right to the environment, modified by some adjective like "safe," "viable," or "clean." These adjectives are the "substance" of the right. The substance has some definable characteristic that can be held up as a measurement or metric with which an individual rights-holder can make a claim against the duty-holder– the environment is not "clean" enough, or is not "viable" for a dignified or sustainable existence.[31] This form of EHR stands in contrast to a procedural right which does not aim at a metric of protection but rather at a protection of a process.

While the introduction states that there are no EHRs yet in practice, this is only partly true. Substantive EHRs as of yet exist mostly as soft law instruments, with the tenable exception of the African Charter on Human and Peoples Rights[32] and a protocol in the American Convention on Human Rights (ACHR).[33] Among the two, only the African Charter has been proven to pro-

[30]For a more exhaustive list, see Turner, p. 46-47, and references therein. Also Saward, Michael *The Terms of Democracy.* Cambridge University Press, 1998; Hayward, p. 149. Also note real-world examples in Boyle *Fordham Envtl. L. Rev 18 [2007]*, p. 479-481, including Article 48A of the Indian Constitution; Article 35 of the Constitution of the Republic of Korea; Article 45 of the Spanish Constitution; Article 225 of the Brazilian Constitution; Article 42 of the 1993 Russian Constitution; and the 1996 South African Constitution. Discussions on these with a U.S. focus are found in Hill, Barry E/Wolfson, Steve/Targ, Nicholas Human Rights and the Environment: A synopsis and some predictions. *Geo. Int'l. Envtl. L. Rev.* 16 2003-2004.

[31]But note that some of the constitutional examples given in the note above, while being substantive in their form, do not create enforceable rights. Rather, they exert influence on "interpretation and application" of general law. Boyle *Fordham Envtl. L. Rev 18 [2007]*, p. 481

[32]AFCHPR (1981) O.A.U. Doc CAB/LEG/67/3/Rev.5 and 21 ILM. 59, also known as the Banjul Charter. Turner notes that the existence of a substantive right (Article 24) is exceptional, although cases have been protracted and one must most often exhaust domestic remedies before coming to the human rights body. See Turner.

[33]The Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights (Protocol of San Salvador) (1989) 28 ILM. 156 (1989)

vide a substantive level of protection.[34] The 1992 Rio Declaration[35] also contains a human-centered—relative to the earlier Stockholm Declaration's treatment of the environment's place in human rights discussions[36]—substantive goal (not right) for environmental stewardship.[37]

The UN's Stockholm declaration,[38] though being the first notable document to explicitly connect personal life to the environment,[39] does not get a detailed treatment here. The document is important in its own right for becoming the first significant condensation of international environmental thinking into a unified legal area.[40] Here, we see the acceptance that an environment must have a certain quality to it that "permits a life of dignity and well-being"[41] and that it's the positive duty of the State to secure such an environment, for both the current and future generations.[42] But, this remains in the realms of positive responsibilities. The benefit of protecting the environment is still seen as beneficial mainly through its expression in the attainment levels of the other fundamental rights, as well as promoting economic, social, and cultural rights. As such, the Stockholm Declaration, like the UDHR, is a directional document, and will not become an explicit right for individuals to assert claims to environment quality. From the citations alone here, there has been much work on the idea of EHRs in general, work indicative of a substantial level of concern for the environment. The African Charter and American Convention on Human Rights of course garner much attention from legal scholars, as have the Stockholm and Rio Declarations. Why then are practicable EHRs still viewed with some skepticism and generally only as goal oriented statements?

For substantive EHRs, the main problem is that of definition. What ex-

See, for an discussion, Déjeant-Pons/Pallemaerts, Chapter 1

[34] Boyle *Fordham Envtl. L. Rev 18 [2007]*, citing the *Ogoniland* case.

[35] officially the United Nations Conference on Environment and Development (UNCED) 31 ILM. 814 (1992); also U.N. Doc. A/CONF. 151/5/Rev.1 (1992).

[36] See Déjeant-Pons/Pallemaerts

[37] Principle 1: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

[38] officially Declaration of the United Nations Conference on the Human Environment, adopted June 16, 1972.

[39] Pallemaerts, Marc; Déjeant-Pons, Maguielonne, editor Chap. Introduction: human rights and environmental protection In Human rights and the environment. Council of Europe Publishing, 2002, p. 11.

[40] Birnie, Patricia/Boyle, Alan *International Law & The Environment*. 2nd edition. Oxford, 2002.

[41] Stockholm Declaration, princ. 1

[42] Gast, Kristen Marttila Environmental Justice and Indigenous Peoples in the United States: An International Human Rights Analysis. *Transnational Law & Contemporary Problems*, 14 2005, p. 274.

actly is a "clean" environment? How does one define that in terms that are both legally serviceable and yet agreeable to environmental advocates?[43] The problem of defining is unavoidable in crafting a substantive right; as Boyle explains, "definitional problems are inherent to any attempt to postulate environmental rights in qualitative terms."[44] Arguably, the cleanliness would be defined relative to human health concerns.[45] Chapter 2 discussed cursorily some problems with linking human health and environment, but there are many more.[46] The metric chosen though is unavoidably arbitrary; the term "environment" itself has not even been nailed down by the UN documents which discuss environmental rights[47] and the ECHR has equally wrestled with these issues.[48]

Some have used the problems of definition to speak as justification of continued utilization[49] of existing human rights to address environmental issues, instead of working on creating a substantive right.

> "The virtue of looking at environmental protection through other rights, such as life, private life or property, is that it focuses attention on what matters most: the detriment to important, internationally protected values from uncontrolled environmental harm. This is an approach which does not need to define such notions as a satisfactory or decent environment, falls well within the competence of human rights courts, and involves little or no potential for conflict with international environmental institutions. . . "[50]

There is something to say about this approach; keeping EHR in a soft law or goal-oriented role allows courts to slowly expand existing rights as cultural and legal conditions permit. At some point, perhaps that growth will be clearly enunciated in practice by a critical mass of court cases and can then be formally treated. Other commentators have similarly noted that, if existing regulatory structures were in fact strictly adhered to, then there would already be this

[43] For more detailed criticisms on this point, see Handl, Günther; Trinidade, Antonio, editor Chap. Human Rights and the Protection of the Environment: A Mildly "Revisionist" View In Human Rights, Sustainable Development and the Environment. 1992

[44] Boyle *Fordham Envtl. L. Rev 18 [2007]*, p. 507.

[45] Or, perhaps, to living beings' health concerns should one take a position outside the anthropocentric mainstream.

[46] Also discussing problems of foresight, note van Lanen.

[47] Birnie/Boyle, p. 256.

[48] Janis/Kay/Bradley, Chap. 8.

[49] Discussed in detail infra at Section 4.2

[50] Boyle *Fordham Envtl. L. Rev 18 [2007]*, p. 507.

defined area of environmental rights;[51] the existing regulations define the area of a substantive right already in a photographic negative sense.

If this were the end of the story, there would be however no problem in simply stating that protected area positively. Perhaps the difficulty in writing even these defined boundaries is that the photograph is still hazy, and needs more time—and more cases combined with regulations—to firm up its outline. It is also plausible that the boundaries are not entirely continuous. Instead of mapping a single area of already-defined environmental protection, there are islands in the human rights landscape which are "recognized" as containing environmental protection. Then the problem of stating positively what already exists in- and between-existing rights becomes clearer. And despite beneficial aspects of attempting to define that area, including notably limiting overlap with other rights and the judicial clarity that comes with it, the problems have been viewed as hefty enough relative to their benefits to keep many people looking at procedural rights, instead of continuing to argue merits of adding substance; Procedural environmental rights do not have such problems with definitions.

Procedural rights are guarantees of access to government decision making processes which affect its citizens. While substantive rights place obligations on the state, procedural rights offer participatory claims, claims to information, decision-making processes, and judicial redress.[52] Procedural rights go back to founding documents in the HR canon[53] and are now well established as a feature of international law, including international environmental law.[54] A procedural EHR is currently the most developed form of EHR recognized, derived as they are mainly from the provisions guaranteeing citizens access to information and decision making processes.[55] They have also received the most support from legal analysis of costs and benefits to rights-based environmental protection[56] largely because the procedural machinery is already more practicable,[57] although it does not necessarily incorporate a lower bound on

[51] Hancock.
[52] Hayward, p. 84.
[53] *Esp.* the Universal Declaration of Human Rights (UDHR) Articles 8, 19, 21. cf. Turner
[54] Notably; The Aarhus Convention, infra at Section 4.2.4.2. Also see, Ibid., n. 40.
[55] Hayward, p. 143.
[56] Most notably, Boyle *Fordham Envtl. L. Rev 18 [2007]*; Boyle, Alan; Idem/Anderson, Michael, editors Chap. The Role of International Human Rights Law in the Protection of the Environment In Human Rights Approaches to Environmental Protection. Clarendon, 1996
[57] Boyle *Fordham Envtl. L. Rev 18 [2007]*.

environmental quality, or better said, degradation.

Much of their support comes from a sense that they are "easier" or more practical to justify because they do not commit the government to environmental goals which can be measured and judged reached or fallen short. Goal-orientation is a similarity between what has become over the past half century environmental law[58] and second generation rights. As Hayward states succinctly,

> "[t]he usual argument in favour of procedural environmental rights is that they are less problematic to justify than a substantive right to an adequate environment because they do not commit governments to the achievement of specific substantive outcomes, but only to allowing the possibility of a hearing to those (whoever they are) who seek to influence the outcomes."[59]

Most broadly speaking then, the key difference between describing a procedural right, which would empower but not dictate an outcome[60], and a substantive right is defining that desired outcome. It is the desired outcome which is hard to specify and more likely to cause dissent across potential signatory parties. The procedural right gets around this sticking point while creating steps toward the goals of a substantive right, although not guaranteeing that substantive outcomes.

Procedural rights are not simply train tracks toward substantive goals though. They should not be presumed to be duty-less for States, nor are they entirely passive. Just as all negative rights do not exist in a vacuum, the State guaranteeing a procedural EHR would still fulfill significant duties in order to enable and sustain the preconditions for exercising procedural rights.[61] Again, like the false dichotomy between negative and positive rights, and as noted by commentators like Holmes and Sunstein,[62] among others,[63] all rights require input. Furthermore, the form that the State decides the preconditions can take are not entirely neutral with respect to environmental outcomes. That is,

[58] "Environmental laws and policies are predominantly *goal-oriented*. Ebbesson, Jonas; Idem/Okowa, Phoebe, editors Chap. Introduction: dimensions of justice in environmental law In Environmental Law and Justice in Context. Cambridge, 2009, p. 1

[59] Hayward, p. 84.

[60] Kravchenko/Bonnie, p. 17.

[61] Hayward, p. 86.

[62] Holmes/Sunstein.

[63] Gray *Two Faces of Liberalism*, p. 111.

the choice of a procedural right can potentially exclude substantive outcomes which would be preferable to EHR advocates. Thus, the problem which gave rise to concerns for an EHR not only remains unsolved but is excluded from solution by the procedures enacted as a compromise protection.

Additionally, the subtle move of the problem of definition into the democratic realm, via enacting procedural rights instead of substantive rights is not necessarily preventing any polluting evil. It remains to be seen if granting citizens' participation, access to informations, or legal standing could actually be used to affect the outcomes desired by EHR drafters. Access to procedures does not solve everything. There is already much concern in the environmental justice movement about procedural access. Citizen participation in the early U.S. siting issues is well discussed.[64] Many of those criticisms would remain valid for protections hoped for by EHR advocates as well. And criticisms certainly abound, mostly in the well-tread direction that

> "[e]ven when public input is sought, projects are often presented as 'take-it-or-leave-it,' a tactic that has understandably left many with the sense that public hearings are 'empty rituals,' more form than substance."[65]

Others have noted more strongly that procedural allowances have simply "promoted the veneer of responding to environmental concerns whilst simultaneously facilitating a continued focus on economic efficiency by eviscerating the rights of any effective impact."[66]

[64] See esp. Cole, Luke W. Empowerment as the Key to Environmental Protection. *Ecology Law Quarterly*, 19 1992. Also Spyke, Nancy Perkins Public Participation in Environmental Decisionmaking at the New Millennium: Structuring new Spheres of Public Influence. *B.C. Envtl. Aff. L. Rev.* 26 1999;

[65] Szasz, Andrew *EcoPopulism: Toxic Waste and the Movement for Environmental Justice*. University of Minnesota Press, 1994. Also see more extensive comments in Kravchecnko, Svitlana The Myth of Public Participation in a World of Poverty. *Tulane Environmental Law Journal*, 33 2009; Cousins, Ken *Smoke in the Skies, Bread on the Table*. College Park, MD, 2001 – Technical report; Guana, Eileen The Environmental Justice Misfit: Public Participation and the Paradigm Paradox. *Stan. Envtl. L. J.* 17 1998. Also recent dissertations by Fraser, Leah Marie *Participation and policy: A case study of environmental justice government-social movement interaction*. Ph. D thesis, University of California, Irvine, 2005

[66] Hancock, p. 103; Hancock goes farther:

> "It is not only the assertion here that legally stipulated environmental human rights are not being implemented in practice it is rather that they cannot be realized in a global political economy given (i) the current configuration of power in civil society that favors economic values over ecological protection and (ii) the ideological and functional nature of law as a hegemonic instrument reflecting powerful social interests." ibid.

These are criticisms to be noted when discussing taking the procedural right route for an EHR; guaranteeing participation, even in the highly polished form of a right, can still end up being only a gloss.[67] Other high-level international documents already acknowledge procedural environmental rights too, including prominently Principle 10 of the aforementioned Rio Declaration,[68] and Principle 6 of the Brundtland Report.[69] The European Union has as well been quite proactive in promulgating Council Directives in this direction.[70] Yet there remain reasons for more extensive environmental protections; the environmental movement and, in particular, the environmental justice movement still speak to that end.

In theory then, there is no cut and dry route to environmental protection via either substantive or procedural rights. If one decides an EHR is necessary, there is little guidance as to which path to choose. And although longer discussions in this direction could certainly be conducted, there is more theory to be investigated, historical insights which give more clues to the direction the human rights winds are blowing. The background of the major human

[67] Note discussions too around the *Aarhus Convention* in Europe. (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters).

[68] "[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes." The declaration goes further in asking States to play an active role in disseminating information.

[69] Principle 6. *Prior Notification, Access, and Due Process*: "States shall inform in a timely manner all persons likely to be significantly affected by a planned activity and to grant them equal access and due process in administrative and judicial proceedings." The report is published as World Commission on Environment and Development, editor *Our Common Future*. Oxford University Press, 1987.

[70] See Déjeant-Pons/Pallemaerts, p. 23-27; discussing Council Directive 90/313/EEC of 7 June 1990 on "the freedom of access to information on the environment;" Council Directive 82/501/EEC of 24 June 1982 discussing responsibilities in major hazardous accidents; Council Directive 89/618/Euratom of 27 November 1989, discussing radiation emergencies; Council Directive 90/219/EEC of 23 April 1990, discussing genetically modified organisms (GMOs); and Council Directive 97/11/EC of 3 March 1997 on assessment of effects of public and private projects. There are more recent procedural directives as well, arising as consequences of the European Community's conclusion of the Aarhus Convention (with 2005/370/EC: Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters). Also Council Directive 2003/4/EC of 28 January 2003, on public access to environmental information and repealing Council Directive 90/313/EEC. Also Council Directive 2003/35/EC of 26 May 2003, providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

rights instruments provides more support for the implied desire to protect human environs, and the jurisprudence of major human rights organs like the European Court of Human Rights back that up.[71]

4.1.3 The Universal Declaration and an Introduction to Human Rights

The now central place of human rights in legal theory and modern jurisprudence was scarred into the cultural conscious by the Second World War. The catastrophic failure of the international order brought not only tragic military consequences, but, for the first time on such a scale, civilian as well. The intellectual effect was a recognition that the documents of the Enlightenment movement and subsequent revolutions were necessary but not sufficient for securing human freedom.[72] Those documents, while ostensibly securing rights of those making up society relative to the supreme power of the state[73] did not protect those same rights when the boundaries of sovereign control were shattered by war.

There, at the end of the war the groundwork for the human rights protection took shape in the form of the Universal Declaration of Human Rights (UDHR).[74]Composed by the United Nations in 1948, the document is groundbreaking both in general and as seen from an environmental justice perspective. The declaration guaranteed a "standard of living adequate for the health and well-being of himself and of his family."[75] This early idea that rights can bring about "adequate" levels of individual existence persists into what is now used to bring environmental claims into the purview of recognized human rights instruments, even instruments that do not explicitly mention the environment.

[71]When unambiguously referring to a case or situation in Europe, the term "The Court" is used as shorthand. But here, the term is augmented by "the European Court," to maintain unambiguous references and a direct contrast to the "U.S. Court," referring to the Supreme Court. It should not be confused with the European Court of Justice (ECJ). The International Court of Justice (ICJ) is similarly left out of the discussion herein.

[72]Documents including the US Declaration of Independence and Bill of Rights, and the French Declaration of the Rights of Man and Citizen.

[73]Sinden, p. 6.

[74] *Universal Declaration of Human Rights*, G.A. Res 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

[75]at Art. 25. On a historical tangent, one might hasten to point out this is groundbreaking in the modern age. Ideas on the duty of the state, especially a ruler, to tend to the welfare and well being, even as far as such modern second-generation rights as medical care, appear in the Edicts of Ashoka in India during the 3rd Century B.C.E.

The UDHR is the outcome of the post-WWII visceral feeling that the rule of law and nations had failed in a tremendous way and needed to be corrected immediately, coupled with the entrenched philosophy of legal positivism. Legal positivism, prevalent during the nineteenth and early twentieth centuries, saw international law as law for and among states and states alone.[76] States were responsible for protecting the rights and freedoms of their citizens, both from without and within, but individuals did not enjoy access to the international legal forum to enforce or challenge the application of States' duties. The reaction to World War II pushed strongly against this, holding Axis participants liable for violations of international law[77] and began the non-positivist revision that individuals' actions run parallel with states' actions in the international legal order.[78]

The "I-know-it-when-I-see-it" emotional and reactionary attitude toward violations in aftermath of the the War spun the wheels of legal change rapidly and the UDHR was the result. The desire to maintain world peace, and to utilize civil and political rights in changing the social order toward those ends was pressing.[79] But the transformation from one legal paradigm to another was not yet complete. Arguably, it is still incomplete. Although the physical machinery to enforce international law by both individuals and states is now in place,[80] albeit sometimes slow in emerging and functioning,[81] humans still get caught in the gaps.[82] The human rights discourse of today can be seen as the motion in progress towards full realization of protection via plugging the gaps which still exist.

Most importantly to the EHR discussion, the UDHR contains both civil and political protections and social and economic rights guarantees, or so-called "second generation" rights. First generation rights are generally libertarian rights and include most of the protections from State encroachment into

[76] Janis/Kay/Bradley, p. 9.
[77] Moscow Declaration of German Atrocities, U.N. Doc. A/CN. 4/5 (3 March 1949).
[78] cf. Ibid., p. 11
[79] Osiatyński, p. 25.
[80] a hurdle noted by Janis/Kay/Bradley, p. 12
[81] Steiner/Alston, p. 557-778 Osiatyński notes that the UDHR overlooked enforcement because "culture is prior to law," focusing on changing society towards enforcement and leaving the rest to the nascent Security Council. See Osiatyński, p. 25.
[82] A good illustration of the gaps is the Trafigura/Probo Koala toxic dumping case in the Ivory Coast. See, inter alia, Verschuuren, Jonathan/Kuchta, Steve; Letschert, Rianne/ van Dijk, Jan, editors Chap. Victims of Environmental Pollution in the Slipstream of Globalization In The New Faces of Victimhood: Globalization, Global Justice and Victim Empowerment. Springer, 2010.

speech, religion, and political organization, the negative rights spoke of above. The term second generation rights is used to describe, in general, rights which embody goals for States dedicated to human betterment. The focus on betterment helps to explain why second generation rights were viewed as having a higher degree of import than civil and political rights to developing countries.[83] One might summarize them as rights focused on equality rather than on liberty and rules of political conduct. The divide between "generations" of rights mirrors that discussed between negative and positive rights, with the second generation rights often categorized as "less universal in the sense that they constitute standards to be attained depending on the level of economic development."[84]

The divide between generations of rights was codified by the UDHR's offspring, the twin Covenants on human rights: the International Covenant on Economic, Social and Cultural Rights (ICESCR)[85] and the International Covenant on Civil and Political Rights (ICCPR).[86] As the UDHR was designed itself as a goal rather than a binding instrument the Covenants were drafted to put obligations on their contracting parties. The drafting process saw the emergence of these differences in opinions on the importance of Civil and Political (first generation) rights relative to Economic, Social and Cultural (second generation) rights. The gulf eventually caused two, instead of one, Covenants.

Today, economic and social guarantees remain goal-oriented.[87] More concrete administration applies to civil and political rights, both in the UN's documents and in regional rights instruments. There is oversight machinery for breeches of ICCPR rights but no such teeth for failure to work towards the goals in the ICECSR.[88] The oversight body of that instrument, named

[83] Osiatyński, p. 24.

[84] Ovey, Clare/White, Robin *The European Convention on Human Rights*. 4th edition. Oxford University Press, 2006, p. 5. Also see Brems, Eva Human Rights: Minimum and Maximum Perspectives. *Human Rights Law Review*, 9 2009, discussing problems with reaching above the minimum human rights requirement.There are also third generation rights, which are the rights of collective groups or peoples. Sometimes referred to as cultural rights which go beyond the relatively traditional economic and social goals of second generation rights.

[85] G.A. Res. 2200A (XXI) (Dec. 16, 1966)

[86] G.A. Res. 2200A (XXI) (Dec. 16, 1966)

[87] Gomien/Harris/Zwaak, p. 379, although the Covenants do have many procedures for reviewing and recommending policy and progress which could have expanded rights ibid., p. 415-429.

[88] Branco, Manuel Couret *Economics Versus Human Rights*. New York: Routledge, 2009, p. 11-12.

the Economic and Social Council, merely reports potential violations in its own reports or to the General Assembly of the UN. Even though the ICESCR guarantees the right to "the enjoyment of the highest attainable standard of physical and mental health", and does so by putting the positive obligation for a healthy environment on State parties,[89] there is no opportunity for debate between individuals questioning their State's adherence to the rules.[90]

Not having access is not the only problem though. There is a substantial tranche of criticism of EHRs, subsumed under the heading of the "means" test. Prominently, the ICESR qualifies these duties and goals of signatory countries to "the maximum of its available resources."[91] As a country could always claim that they do not have the resources to, say, assure every working person of a job, there is always a way out. As Branco notes, "by introducing an availability of means clause, rights are objectively placed on the same footing as wants."[92] That is, society cannot supply everything, and so scarcity governs not only goods but also these types of rights. Nothing could be a more clear abrogation from "fundamental rights" than this loophole, and from it flows many of the thoughts that second generation rights are somehow lower than first generation guarantees. Gaining a committee to evaluate claims of derogations on social rights could easily but up against the means test.

The codified split between Civil and Political rights and Economic, Social, and Cultural rights, and the continued reference to "first" and "second" generation rights, illustrates the longevity of the disagreement about the place and power of each group and the role the State is committed to playing.[93] To be sure, some of that argument was prodded by the Cold War bi-polar world, following U.S. adherence to rhetoric on the necessity of civil and political rights in democratic society and the Soviet Union's claims that economic and social rights are foundational.[94] And although (or perhaps because) the superpower-

[89] art. 12(1), See also Gast, p. 275

[90] This does not mean the Committee on Economic, Social and Cultural Rights is entirely powerless. For this work though, suffice it to say that they are aligned with the general direction of other human rights instruments' motion toward positive rights. See Bodansky, Daniel Climate Change and Human Rights: Unpacking the Issues. *Georgia Journal of International and Comparative Law*, 38 2010. Also Committee on Economic, Social and Cultural Rights General Comment 14, The right to the Highest Attainable Standard of Health, UN Doc E/C.12/2000/3 (2000).

[91] Part II, Article 2, Para 1.

[92] Branco, p. 15.

[93] Steiner/Alston, p. 237.

[94] Branco, p. 10.

dichotomy in rhetoric is a bit of a caricature[95] the civil and political rhetoric apparently took the lions share of the spotlight with the collapse of communist spheres of influence, there has been a shift away from the emphasis on the differences, especially as expressed in terms of negative versus positive duties.[96] Nevertheless, the split still reflects a difference in opinion on the means with which to enforce the categories of rights.[97]

The two forms of rights and the history they carry from the twin Covenants, come to the forefront in Article 1 of the ECHR: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." The phrase "shall secure" implies both negative obligations to not infringe protected spheres *and* positive guarantees to give—secure—rights where they do not exist on their own. On a technical point, the construction of the ECHR is to have Articles enunciate rights in paragraph one with derogations in paragraph two under the Article, which "proscribes certain actions that 'interfere' with or restrict that right except in special circumstances."[98] Most article have derogations written explicitly in paragraph two. Technically, though, the judgment of *X. and Y. v. the Netherlands* implies that even in the absence of explicit paragraph two restrictions in individual Articles, the mere voicing of the right (its mere existence) in paragraph one would place obligations on the state. That is, positive obligations can result entirely from paragraph one.[99] The duty "to secure" also arises from wording in the text of the Convention in other locations, such as that the framework of the rights secured must be "practical and effective."[100] Article 13 also calls for Contracting Parties to supply the remedies domestically. These are all positive obligations on the state to *provide* and begin to illuminate reasons for reluctance in adopting more positive-type rights; without accurate definition and boundaries, such rights are potentially open-ended commitments. Nevertheless, the original commitments do open

[95] Osiatyński, p. 18, n. 79,80, p. 36, clarifying that although it was not a split that started at the beginning, it did evolve along those lines, though for reasons due to the evolution of the states themselves and not the ideological outset conditions.

[96] Inter alia Holmes/Sunstein

[97] Osiatyński, p. 31; Donnelley, Jack/Whelan, Daniel J. The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight. *Human Rights Quarterly*, 29 2007, n. 132

[98] Janis/Kay/Bradley, p. 392.

[99] Although one hastens to add that the ability for respondents to "justify" discrimination arguably amounts to a derogation.

[100] Mowbray, p. 5.

up toward positive obligations for signatory countries. This is the intellectual inertia stemming from the UDHR and the twin Covenants and continues to shape jurisprudence today.[101]

The fact though remains, despite the open-endedness of the document, the major human rights inertia stems from a post war milieu, an intellectual history which draws from the outcomes of overreaching State power into their subject's private sphere. The evolution of negative rights, as well as their success on checking State power against the individual, stands as a great success story but also as a relatively more developed area of law because of this past. As Steiner and Alston quip "What good is free speech when you're starving an illiterate?"[102] Second generation rights, requiring more positive involvement, while not being as entirely different in commitment as earlier thought, could be a second wave of protections only now beginning to show the same fruits as their earlier siblings.[103]

The last decades have seen a dramatic increase in the power of the ECHR, and the ECtHR, including their acceptance of a great range of positive duties on States, despite concerns of overreaching or burdening States with too many positive burdens. The relative growth of the ECtHR compared to other major instruments with rights-based goals[104] then explains much of the excitement

[101]Explicitly recognized in *Kosiek v. Germany* application no. 9704/82, judgment of 28 August 1986, para 34.

[102]Steiner/Alston, p. 273. In this vein, Judge Weeramantry of the International Court of Justice summarized that

> the protection of the environment is... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments."

Judge Weeramantry, separate opinion, *The Case concerning the Gabcikova-Nagymaros*, ILM, Vol 37, 1997, p. 162.

[103]Rachel Carson noted a similar thought in the epigraph to this chapter. Not to mention authors who see a "right" as existing if regulations were only fully implemented. Hancock

[104]Including the European Social Charter, which we do not discuss at length here. Briefly, the formal split between "families" of fundamental freedoms seen in the two Covenants is also embodied in the two major rights instruments of the Council of Europe (CoE). The same disagreements in the UN led to the adoption of the ECHR and the European Social Charter, which focused on social and economic rights, instead of a single human rights document. See Gomien/Harris/Zwaak, p. 377; discussing the need to split the two concepts in order to speedily ratify and put into practice traditional civil and political rights. At the European level then the ECHR is thus a rough analogue of the ICCPR, while the European Social Charter is akin to the ICESCR. Differences include the ability for parties to choose which articles under the Charter they become party too, while the Covenant is an all-or-nothing treaty. See ibid., p. 380,407-409. This is a relatively superficial introduction, however. For a

and literature on environmental human rights, and comments that Europe is moving toward securing to individuals the full gamut of rights set forth in the Universal Declaration.[105] Even if some claims of positive trajectory are exaggerated, we are certainly seeing "second generation outcomes" by stricter adherence to first generation rights as applied to the needs of others.[106]

In either case, the power the Court has gained is leading policy change inside Europe. Much of these changes are directly in line with hopes of environmental justice advocates and serve as examples of what protections exist at the human rights level as well as how they function. Furthermore, one can expect the function of the European Court to trickle down its affects to domestic policy, in forms such as increased regulation, preemptive action, and protection between all parties in society.

To be clear, the European Court can find a member state's internal law contrary to the Convention and thereby oblige the state to alter that law.[107] The European Court however cannot itself alter the law nor instruct the state on how it should change. It is the duty of states to be in compliance with the Convention, but the Convention need not specify what form that compliance takes. Nevertheless, the Convention does not merely govern direct State-individual interaction. This influence on realms of law and interaction external to the text of the Convention is often referred to as *Drittwirkung*. Further, this "trickle down" extends from the ECHR into other supranational realms. For instance, Canada and the UK have been noted as incorporating precautionary environmental law as a direct result of international laws.[108] Trouwborst also notes that the flow in places like Germany has been reversed; stringent national environmental law has been brought up to the inter- or supra-national level.[109] From both directions then Europe is seen to be ratch-

deeper study on the relationships, see Gomien/Harris/Zwaak. It is noted here as a continued indication of the strife between the two camps of rights—globally at the UN in the mid-twentieth century, and continuing into the unified Europe today. Even today, applicants to the Council of Europe must sign the European Court, but are not required to adhere to the ESC. See Steiner/Alston

[105] Gomien/Harris/Zwaak, p. 378.

[106] See San José, Daniel Garcia *Environmental protection and the European Convention on Human Rights*. Council of Europe Publishing, 2005

[107] Janis/Kay/Bradley, p. 75.

[108] Scott, Dayna Nadine *The Mutual Constitution of Risk and Precaution*. Ph. D thesis, York University, 2005, p. 24; citing Trouwborst, Arie *Evolution and Status of the Precautionary Principle in International Law*. Kluwer Law International, 2002, p. 17. Also note how international criminal law has functioned similarly, "imposing duties directly on individuals. . . " Bodansky, p. 11

[109] Trouwborst.

eting environmental protections upward and toward harmonization, though specifics of EU law are not discussed herein.[110]

One can see from this introduction why the United States, with a heavy influence on individual rights, has been more hostile toward social rights. This was not always the case though, and perhaps the best example of this once promising terrain in the U.S. is Franklin Roosevelt's proposed "Second Bill of Rights" in his State of the Union speech in 1944.[111] The proposal, which would have guaranteed rights to a home, job, living wages, medical care, education, and economic protection from detrimental but largely unavoidable circumstance bears many similarities to today's positive rights embodied in the European Convention. But, basing their opinion on the wording in their national constitution, the U.S. Court now view "rights" guaranteed to citizens to be negative in nature, limiting state power to act instead of positive requirements to guarantee standards, and the forward-looking Second Bill of Rights is all but forgotten.[112] The story is noted in passing to show that the U.S. is not diametrically opposed to the European movement toward positive rights, although they are presently lagging behind.

The worries in the U.S. are the same as those in Europe. At the time of the adoption of major human rights instruments like the UDHR, there was little way to bind parties to such a seemingly open-ended commitment as economic rights. To get the Covenant signed at all required such compromise, likely predicated on the hope that years to come would bring steps toward a more binding protocol. As that day has not yet come, economic rights remain subordinate to Civil and Political rights and discourse, and concerns of open-ended commitments make the political discourse hostile. Nevertheless, even if placed in the U.S. context, goal-oriented rights are not rendered "soft" simply because there is no court oversight.

[110]Note that this is arguably unlike what one sees in the U.S. discussion on international human rights, whose discourse has an entirely different feel to it. Note Bodansky, Daniel Climate Change and Human Rights: Unpacking the Issues. *Georgia Journal of International and Comparative Law*, 38 2010 and contributors therein.

[111]Fleischacker, Samuel *A Short History of Distrubive Justice*. Harvard University Press, 2004, p. 82-83.

[112]See *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S. Ct. 998 (1989). cf. Steiner/Alston, p. 252, noting in contrast Brennen J.'s dissent that inaction can be just as much of an abuse of power as action on the part of the State.

4.1.4 Drittwirkung and Conclusion

The Convention, as a human rights treaty, is designed first and foremost as a regulator between State and Individual. But the Convention also has a *Drittwirkung*, or third-party influence.[113] Read narrowly, the Convention indeed would only bind direct State-Individual[114] action and interaction. In this sense, the Convention, and all human rights treaties similar to it, elevate the status of the individual above that which they enjoy under international law governing actions between States alone. In the latter form of regulation, the individual enjoys protection only as an object at their location within the territory which is adhering to international law.[115] In the realm of rights protected by the Convention however, the individual is a subject, not an object.

If the Convention is only a document governing dynamics between a State and a Subject, overseen by a supra-national court, then we can expect to see ample protection of negative rights. The existence of positive obligations flowing from several passages within the Convention however bind the State into taking action where it is necessary to secure rights for its subjects. This may consequently force the State into the role of legislating conduct between private parties, not merely checking its own behaviour with respect to the individual. This extra duty then impels the State to control actions between private parties where there is no State contact.[116] Thus, the *Drittwirkung* of the Convention is "third-party" rights which "flow from the national law implementing the State's obligations under the Convention rather than from the Convention itself."[117]

It is quite impressive how the Court's jurisprudence has shifted more and more toward recognizing what once could be called sweeping views of rights granted. The extensive literature on positive obligations and *Drittwirkung* of the Convention say much to the European commitment to achieving a previously unknown standard of human rights. Indeed, this is a metric with which to measure the past 3 decades' of "partial erosion of the generational gap between

[113] Dröge, Cordula *Positive Verpflichtungen der Staaten in der Europischen Menschenrechtskonvention*. Max-Planck-Institute für ausländsiches öffentliches Recht und Völkerrecht, 2003.

[114] And State-State actions, though they are more rare.

[115] Gomien/Harris/Zwaak, p. 17.

[116] For example, *Costello-Roberts v. the United Kingdom* application no. 13134/87 judgment of 25 March 1993.

[117] Ovey/White, p. 52.

Convention rights and later generations of human rights."[118] By allowing and influencing a move in this direction, the Court has affirmed a commitment to forcing the State to take on more responsibilities in more situations toward securing individual rights. Although the expansion of the Court was something of a concern in the days of the treaty's negotiation,[119] the remarkable level of compliance compliance[120] of signatory countries to the rulings are an affirmation of the leadership role of the Court.[121]

This is the broad brush with which the European Convention paints. Taking into consideration the explosion of method and means for the modern State to invade the classical sphere of liberty, as envisioned by the Enlightenment thinkers who laid the foundation for modern democracies, this expansive stroke might be the necessary counter.[122] And it is into this brave new world of expanding human rights' *duties* in Europe that we begin to discuss now. And despite the fear-filled milieu in which this, and the European Convention on Human Rights, brought to the world modern human rights, there was nothing inevitable about their emergence and certainly not of their acceptance as governing documents.[123] Therefore it really is a brave new world, as opposed to a planned world, into which the jurisprudence is expanding. Th expansion currently sketches what protection has grown from the humble civil and political rights base into a forward-focused, but as-yet undefined, environmental human right.

[118] Mowbray, p. 231; discussing *Airey v. Ireland*, application no. 6289/73, judgment of 9 October 1979, which states that "fulfillment of a duty under the Convention on occasion necessitates some positive action on the part of the State", at para. 25.

[119] Janis/Kay/Bradley, p. 115.

[120] Problems do exist, though not often referred to in the literature. For discussion see Council of Europe *Implementing Judgements of the European Court of Human Rights*. Strasbourg, 18 September 2006 (Doc. 11020).– Technical report; Greer, Steve *The European Convention on Human Rights: Achievements, Problems, and Perspectives*. Cambridge University Press, 2007, p. 278-313

[121] Janis, Kay, and Bradley (p. 19, 2008) note that at the time, the Europeans were familiar with bills of rights akin to the US's version, but were unfamiliar with judicial enforcement of those rights. To move from that shaky footing to near perfect compliance is quite an accomplishment.

[122] See Ferguson, Niall *The Cash Nexus: Money and Power in the Modern World, 1700-2000*. Basic Books, 2001, p. 362; citing de Tocqueville's fears of a diminution of liberty. Note Osiatyński's history of human rights, drawing attention to the Enlightenment change of liberty from the Medieval context, Osiatyński, p. 3

[123] Regarding the UDHR and inevitability, see Ibid., p. 22.

4.2 The European Court and Derived Environmental Rights In Practice

The European Court of Human Rights (ECtHR) is the judicial body overseeing the European Convention on Human Rights (ECHR). As suggested above, the ECHR has grown into the world's strongest and most developed system of the protection of fundamental freedoms.[124] As the most developed system it also carries the distinction of coming quite close to creating, through its jurisprudence, something like an environmental human right. Though not explicitly recognized anywhere in the Convention, the human/environment nexus is fleshed out in important albeit tangential contexts. Through the decisions of the European Court one can though see outlines of a conception of EHR. That shape is sketched below in the exploration of the cases which constitute the form and substance to the idea.

The aim of this section is not to show or "prove" that an EHR exists, or that it is already explicitly recognized, or that it is needed in the human rights canon; these topics have been addressed more directly and in far more detail already.[125] The purpose of this section of the chapter is rather to illustrate simply the protection of the environment that exists via the Convention, and, in doing so, clearly spell out what it does and what it does not accomplish. With that information in hand, one can clearly see where the human rights canon already provides rights-like protection of the environment and where it comes up short relative to ideal subjective or procedural rights discussed above. Furthermore, one sees where the derived protection both succeeds and falls short for environmental justice ends. The picture dimly suggests though a hidden strength that could be *adapted* toward environmental justice ends.[126]

4.2.1 The Convention and Court

The ECHR was adopted by the Council of Europe shortly after its own creation.[127] Like the Council, the Convention then is also an example of the

[124] *inter alia* Janis/Kay/Bradley, p. 114; Gomien/Harris/Zwaak, p. 18

[125] See Gomien; Hancock; Eide, Asbœrn/Krause, Catarina/Rosas, Allan, editors *Economic, Social and Cultural Rights: A Textbook*. Martinus Nijhoff, 2001; Anderson/Boyle; Gormley

[126] See Chapter 5.

[127] For an introduction to the history of the Convention see Ovey/White; Gomien/Harris/Zwaak.

solidification of European ideals following the devastation of World War II and as a counter-weight to the emerging Soviet-bloc ideology. The milieu gave the Council a very strong motivation to compose the Convention on Human Rights giving form to the protection of "spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom..."[128] The spirit of the times make it easier to see how such a broad instrument was able to congeal among such heterogeneous peoples. As Janis, Kay and Bradley explain,

> "[i]t was relatively easy in the wake of the brutal experience of the war against fascism for the European survivors to agree both on the importance of protecting human rights and on the inadequacy of relying solely on national enforcement system."[129]

This move to secure fundamental freedoms mirrored the young United Nations' parallel attempts, enshrined in the UDHR and, as such, could be viewed as a young "Bill of Rights" for the European nations.[130] Indeed, as the most advanced human rights machinery in the world, this analogy grows stronger with each passing judgement.[131]

The European Court is the judicial strength behind the Convention. Their job is to interpret the Convention for the CoE.[132] The strength and teeth come from the Court's empowerment via the Convention as having jurisdiction over all member states [133] and from the ability of both States *and* individuals to lodge complaints.[134] To effect its responsibilities, the Court, located in Strasbourg[135] employs one judge from every CoE nation, elected into their

[128]Preamble of the Statute of the Council of Europe (CoE), May 5, 1949. The Council of Europe has since expanded to include many ex-Soviet bloc nations, and extends well past the more restricted membership of the European Union.

[129]Janis/Kay/Bradley, p. 114.

[130]See Abdel-Monem, Tarik How Far Do the Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights. *J. Transnational Law & Policy*, 14 2005, p. 165 and intra Section 4.1.3. UN—seeUnited Nations niversal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., art. 3, U.N. Doc. A/RES/810 (1948)

[131]Notably, in support of the claims both of being the most advanced and growing stronger, the European Court is having troubles keeping up with case load. See discussions on changes in procedures and future plans in Janis/Kay/Bradley

[132]Abdel-Monem, p. 164; European Convention for Human Rights, art. 19.

[133]Convention, art. 1, 32(1), 32(2), 46(1)

[134]Convention, art. 34

[135]The city is often used in literature in place of saying "the Convention" or "The Court of Human Rights", and distinguishes the legal actions from the European Court of Justice, located in Luxembourg.

positions for six years by the Parliamentary Assembly of the Council.[136]

Petitions for alleging violations are admitted to the Court only after review and unanimous decision by a three-judge Committee.[137] Cases are only admissible if

1. the applicant has exhausted domestic remedies

2. the application is not anonymous and cannot be "substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure

3. the application is not found manifestly ill-founded or an abuse of the right to petition.

Admissibility is arguably the most important aspect of the ECHR-system given that 97% of applications are never declared admissible.[138] Some rejections have to do with failure to exhaust domestic remedies while others are rejected on their merits. Given that much of the implementation of Europe's human rights goals happens at the domestic level, the high rejection rate should be seen more as a purposeful positioning of the Court as a guiding hand and not the operative hand, and certainly not as an indication that the European Court does not have an impact.[139]

Prior to the recent entering into force of Protocol 14, the Court itself consisted of these admissibility Committees of three judges each, followed by Chambers of seven judges, and a Grand Chamber of seventeen judges capping the hierarchy.[140] Now,[141] admissibility can be decided by a single judge formation where there is no question as to admissibility.[142] The three-member admissibility Committees above the single-judge formation can now also decide cases on their merits in stead of focusing on admissibility/inadmissibility.[143] They can also take action on admissibility and merits jointly. In addition,

[136] Abdel-Monem, p. 165.
[137] Article 27-28, creating the new Committee structure after the adoption of Protocol 11. Article 35 (1-2) spells out specific admissibility criteria.
[138] Janis/Kay/Bradley, p. 28.
[139] Of course, the increasing case load and increasing application numbers do give pause and concern that valid and important complaints are lost in the filing or fail to garner the attention they would otherwise.
[140] Article 27
[141] As of 1 June 2010
[142] The judge in such a single decision cannot address cases from their home country.
[143] See Article 26, ECHR (old Article 27 with amendments.)

new admissibility requirements have come into effect which allow the European Court to focus on the most pressing of issues, issues which clearly rise to the level of a human right violation. All of these measures are meant to streamline the increasing caseload of the European Court.

The Grand Chamber hears especially difficult cases which raise questions of the interpretation of the Convention or when decisions may not be consistent with past decisions.[144] With Protocol 14 now in place this also appears to be the renewed focus of the entire court system. This is an important focus because the Court is purposefully not bound by its previous decisions; an aspect designed by the framers to allow for the Convention be a living instrument and to move with the times and underlying social currents.[145] The Chambers are motivated by their own precedent, the common law doctrine of *stare decisis*, as a guiding element in developing a common European standard for human rights.[146] Now with the new Protocol 14 that goal of elaborating their own precedents becomes even more explicit.

Petitions come to the Court in the form of individuals lodging complaints against a State of a violation, or failure to guarantee, a right granted by the European Court.[147] Less often, complaints by States against States are lodged. The individual's ability to bring a case on their own—individual legal standing—is an important structural design, fought for at the very outset of negotiations.[148] "Individuals" can include persons, NGOs and groups of individuals claiming to be victims, as described in Article 34 and *Gorraiz Lizarraga and Others v. Spain*.[149] The right to petition the Court individually is secured in Article 25.[150] Protocol 14 however limits petitions from situations where "the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic

[144] Article 30

[145] Council of Europe *Manual on human rights and the environment*. Council of Europe Publishing, 2006, p. 7.

[146] Gomien/Harris/Zwaak, p. 18.

[147] Ovey/White, p. 10.

[148] *See* Janis/Kay/Bradley, p. 16-18

[149] application no. 62543/00 judgment of 27 April 2004 para 46,47.

[150] Class action suits are also permitted in situations where a systemic shortcoming in Convention adherence by a State warrants "general redress," though these are not routine. See *Broniowski v. Poland* application no. 31443/96 judgment of 22 June 2004.

tribunal.[151]

The changes are again meant to streamline the European Court's caseload and the focus on rendering decisions which help clarify interpretation of the Convention and the signatory states' responsibilities thereon. As the degree to which this strengthens the individual's access to redress is currently unknown, this chapter continues under the assumption that it will at a minimum not reduce access. After all, the protocol's changes aim to free the Court's time for interpretive functions in new or less-well defined areas of Convention law, exactly where new areas of environmental protection may be derived. And the individual's right to petition is unchanged; it is only the magnitude of the complaint which may need to be larger before being dealt with by the Court proper.

The power granted to individuals here is a right in itself which should not be understated, either in its effects on the individuals affected or on the European Court itself. According to notable scholars,

> "[i]t seems that the right of access of private suitors has been crucial to bringing the system of human rights law alive. Between 1955 and 1997, there were only 13 state petitions filed with the Commission, but there were 39,034 private claims."[152]

Obviously, a person can decide to bring a suit without the oft-present political baggage that might weigh against the decision for a State to bring a case against another State. Allowing individual petitions thus is a massive development in the forum of international law because of both its substantive and formative effects on the system as a whole.[153] In this sense, the Convention elevates the status of the individual above that which they enjoy under international law governing actions between States alone. In the latter form of regulation, the individual enjoys protection only as an object at their location within the territory which is adhering to international law.[154] In the realm of

[151] Protocol 14, Article 12; now Article 35 ECHR, paragraph 3(b).

[152] Janis/Kay/Bradley, p. 75. Note that the term "Commission" here refers to the European Commission of Human Rights, a tribunal that existed until 1998's reorganization of the Court under Protocol 11 which did away with the Commission as the first step to admitting a human rights violation case to the Court.

[153] Here is not the place to discuss, in a comparative law sense, the right of individual standing in the ECHR versus the now-truncated standing of individuals to bring actions on §602 of the US Civil rights act, vis-á-vis environmental justice or EHR concerns. See instead Chapter 5, esp. Section 5.3.2.4

[154] Gomien/Harris/Zwaak, p. 17.

rights protected by the Convention however, the individual is a subject, not an object. While empowering for individuals, the construction does dictate that the individual must be the victim in fact, or be exposed to a threat of injury in the future, by a human rights violation and cannot lodge complaints *in abstracto*.[155]

How the Contracting Parties elevate the individuals to this level differs across nearly all countries. To foreshadow, this has relevance for the study of environmental justice in Europe in that the complexities of how the national jurisdictions give specific force to the Convention can make the path of an individual's claim to the Court complex, but the Contracting Parties in all circumstances are fully accountable in the end for giving full effect to the rights and for adequate remedy for complaints.[156] For instance, the ECHR was given domestic legal status in the UK by the Human Rights Act of 1998, while it has constitutional law status in Austria, and lies between constitutional law and domestic legislation in France.[157] Domestic courts are tasked to incorporate—to give full affect to—the protections of the ECHR in whatever manner fits the idiosyncrasies of their particular legal system. The flexibility has no doubt smoothed the uptake of fundamental protections into national law, sliding past many legislative and political hurdles.

Smoothing transitions from international human rights law into heterogenous domestic practice is a codified and purposeful part of the Court. The European Court operates on the overriding principles of "subsidiarity" and "solidarity."[158] Both convey the tone that the solution to human rights violation lies at the lowest and smallest levels of social and political interaction. Solidarity means that Contracting Parties will secure the rights guaranteed by their signatures by tuning their national legal systems to prevent violations. Subsidiarity means that political actions toward remedy should be taken at the lowest possible level; that is, the Court will play a subsidiary role to national legal entities. This principle also gives us the rule that, in all but the extreme cases, the Court will only hear cases which have exhausted domestic possibilities for remedy.[159] In this case, that means the national jurisdictions should play the foremost role in prevention of violations as well as guaranteeing

[155] Gomien/Harris/Zwaak, p. 44.
[156] Article 52.
[157] See, inter alia, Ovey/White.
[158] Ibid., p. 18.
[159] Article 35(1); Article 26 of the old Convention (pre-1999).

positive freedom.

When prevention of violations fails, decisions rendered for the plaintiff, whether rendered by a Chamber or the Grand Chamber, are overseen toward execution by the CoE's Committee of Ministers. The Committee of Ministers is the executive branch of the CoE and enforces the rulings of the ECtHR, which can include monetary damages to plaintiffs or a change to a member-state's domestic laws.[160] There is, however, little power the ECtHR can wield over the offending party, save for the draconian measure of removing a State from the CoE.[161] The Court did gain some new oversight powers with the newly imposed Protocol 14, where they may render interpretation on a final judgment of which the Committee of Ministers finds a member state having trouble with in order to more quickly bring them into compliance. The Court can now also more rapidly pursue action from non-compliance.[162]

Above these limited oversight powers, the power of the Convention rests—simply but securely—on a commitment by the contracting parties,[163] which

[160] Convention, art. 46(2) (supervision of execution of judgements), art. 41 (just satisfaction). See esp. *X and Y v. the Netherlands*, judgment of 26 March 1985, A/93 cf. Alkema, Evert Albert; Matscher, Franz/Petzold, Herbert, editors Chap. The third-party applicability or "Drittwirkung" of the European Convention on Human Rights In Protecting Human Rights: The European Dimension. Carl Heymanns Verlag KG, 1990, p. 44 . See also Osiatyński, p. 40.

[161] Abdel-Monem, p. 169-70; Greer, p. 278. The only time a state has almost been forced to leave the Council of Europe was after the Greek coup d'état in 1967 and an inquiry into the new government's human rights offenses. Greece chose to leave the Council instead of facing expulsion. *See The Greek Case*, 196 (1969); 12 Yearbook of the European Convention on Human Rights. Also Janis/Kay/Bradley, p. 57-66

[162] Article 16 of Protocol 14, paragraphs 3,4: (3) "'If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee. (4) If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfill its obligation under paragraph 1."

[163] Article 46 Binding force and execution of judgments 1) The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2) The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. *Note, inter alia Vermeire v. Belgium* judgment of 29 November 1991, 15 E.H.R.R. 488, discussing permissible and non-permissible lags between ECtHR judgments on domestic practice and legislative action to remedy the breach. For examples of judgments that led to significant changes in national systems, see, inter alia, *Benthem v. the Netherlands* judgement of 23 October 1985, 8 E.H.R.R. 1; judgment which is bounded by, at a minimum, the fact that the Convention does not *require* States to give direct effect to the rights in national law. *See Republic of Ireland v. United Kingdom* judgment of 18 January 1978, 2 E.H.R.R. 25. Although the structure of some national legal

although lacking true police power functions quite well. Even without enforcement power, compliance with judgements is nearly perfect.[164] Though that fact does not necessarily imply that national regulators take European Court decisions and quickly implement them, as the domestic courts can (and do) play a very significant role in implementing the Convention's goals, it nevertheless is strong evidence that goals enshrined at the ECHR level do not remain simply goals but are, through several channels, implemented on the ground.[165] It is also notably in a comparative view with the U.S.'s human rights themes, where there is significantly less discussion on translation of international rights' goals through the practical levels of domestic courts.

Above the technicalities of bringing cases and enforcement of judgments, and more germane to the issue of environmental justice, is that domestic legal systems that sit uncomfortably in some respects with ECtHR precedents have measurable pressure to conform.[166] This includes of course States which are not party to the action or judgement at hand. The positive obligations to which each State consented means that they will feel pressure and influence to change their own situation should they find themselves sitting similar to another State whose laws and practices are questioned.[167] Similar influence flows through *drittwirkung* channels.

The track record, both in execution of judgments and bringing national law into cooperation with the Convention, and despite the lack of punishment procedures, is what makes the ECHR the "most developed Human Rights system in the world."[168] In fact, this level of adherence and deference to the judgements of this international court sit quite contrary to the predictions and the evidence in other areas of international attempts at co-operation. There is always a concern as to the willingness or readiness of states to concede

systems, for instance, the Netherlands, gives the Convention, as a treaty, effect in domestic law without any further act of legislation such as the U.K.'s 1998 Human Rights Act. Full discussion of the Convention's impact and operation in national legal systems is found in Blackburn, Robert/Polakiewicz, Jorq, editors *Fundamental Rights in Europe: The ECHR and its Member States, 1950-2000*. Oxford University Press, 2002.

[164] Abdel-Monem, p. 170; *also discussed in depth at* Janis/Kay/Bradley, p. 103-116.

[165] Again, this is strengthened by the new and as-yet untested additions under Protocol 14.

[166] Perhaps the most important illustration of this is the U.K.'s 1998 Human Rights Act. See Ibid., p. 854-873

[167] Compare *The Sunday Times v. United Kingdom*, Series A No 30 judgement of 26 April 1979 and Ibid., p. 86-88

[168] Gomien/Harris/Zwaak, p. 18.

"independent legitimacy to inter-governmental committees and assemblies."[169] The ECHR though has triumphed handily in this regard.

One thing notably missing from the ECHR, relative to the environmental justice discussion, is a focus on minorities.[170] There is only one substantial mention of "minorities" in the ECHR.[171] Hence, the Convention would apparently seem to have little direct say against discrimination, and prevention thereof would have to flow from protecting the general canon fundamental rights. Nevertheless, the Court's jurisprudence has been broad in addressing even indirect discrimination.[172] The Convention, and the Court supporting it, are thus prepared to address discrimination, but similar to the situation in the US,[173] the Court comes at the issue indirectly and requires a "thick set of statistical and narrative evidence."[174]

In the end, the amazing ability of the Court to become one of the first truly supra-national and legitimately powerful forces in the new Europe is an unquestionable success. The level of deference to which national governments have granted this new body is remarkable, especially considering its age. The jurisprudence shows a powerful trend toward *direct* involvement in imposing human rights responsibilities on a large swatch of State-related phenomenon, including third party interactions. The Convention is therefore already primed for protection of values and areas not necessarily included in the text of the document itself.

The focus here on the European Court (and Convention) on Human Rights stems from the simple fact that, in recent years, human rights instruments have

[169] Strange, Susan *The Retreat of the State*. Cambridge University Press, 1996, p. 184. Note also the acquiescence of the parties to the EC to Article 234 EC, under which national jurisdictions submit to oversight by the ECJ, which "obliges the national jurisdictions to submit to the interpretation of the requirements of EC law by the European Court of Justice..." De Schutter; as well as to the jurisdiction of the ECtHR under Article 46 of the Convention.

[170] See discussion in Osiatyński. Osiatyński, p. 21

[171] Article 14 ECHR, also note Article 1 of Protocol 12, para 1. Like Article 14, Protocol 12 is aimed at preventing discrimination. Unlike Article 14, it is freestanding. Unfortunately to the project on hand, its newness and unratified status in many major countries leaves little for us to explore. Nevertheless, it deserves short mention here for the role it may play in EHR generally. The Council of Europe's Framework Convention for the Protection of National Minorities (1995) also similarly lacks reference to the ECHR.

[172] See *Thlimmenos v. Greece*, application no. 34369/97, judgment of 6 April 2000; Note however discussions as to the limits on the autonomy of Article 14 infra at p. 211; and in Åkermark, Sia Spiliopoulou The Limits of Pluralism–Recent Jurisprudence of the European Court of Human Rights with Regard to Minorities: Does the Prohibition of Discrimination Add Anything? *Journal of Ethnopolitics and Minority Issues in Europe*, 3 2002.

[173] See infra Section 3.3.2.

[174] Ibid., p. 21.

truly become a viable path toward addressing environmental harms. Theoretical discussions aside, the connection between pollution and human safety, health, and rights to a protected private sphere has been strongly recognized by the ECtHR, more than perhaps any other legal body. And although there is still no direct right to an environment, or even a procedural requirement, there is clearly an evolving indirect protection of the environment via the human rights approach.[175] The above introduction helps illustrate how and why this expansion has been possible.

More specifically, the trend toward a more expansive reading of the Convention's articles can be traced back to early cases whose decisions set out the rules of interpretation of the Convention. The Court relied on the Vienna Convention on the Law of Treaties, signed in 1969, as support and for guidance in their analysis.[176] The "good faith" doctrine of interpretation, which the Court incorporated in the early *Golder* case,[177] coupled with other early cases[178] stating that the Convention will be read to realize the aims and objectives of the treaty, set the trajectory for the Court.

It is these "aims and objectives" that have been read now to include problems with the environment which touch on other protected aspects of human security. The European Court has now heard claims of environmental issues creating violations of the right to life,[179] the right to respect for the home and private life,[180] the right to effective domestic remedies,[181] and the right to a fair hearing in the courts in relation to environmental problems.[182].

An expanding relationship between established human rights and environmental issues is treated as unambiguously beneficial for proponents of more

[175] Or, protection *par ricochet* cf. San José.

[176] Ovey/White, p. 38.

[177] *Golder v. United Kingdom*, judgment of 21 February 1975, Series A, No. 18. para 29, following Vienna Convention article 31(1).

[178] *Wemhoff v. Germany*, application no. 2122/64 judgement of 27 June 1968, para 8; stating interpretation is that which is"... most appropriate in order to realise the aim and achieve the object of the treaty..."

[179] Article 2 of the Convention. e.g. *Ö*neryildiz v. Turkey, application no. 48939/99 Grand Chamber judgment of 30 November 2004.

[180] Article 8 of the Convention. E.g. *Hatton and Others v. the United Kingdom*, application no. 36022/97, Grand Chamber judgment of 8 July 2003; *Guerra and Others v. Italy*, application no 116 /1996/735/932, Grand Chamber judgment of 19 February 1998.

[181] Article 13 of the Convention. E.g. *Powell & Rayner v. the United Kingdom*, application no. 9310/81, judgment of 21 February 1990.

[182] Article 6(1), E.g. *Taskin v. Turkey*, application no. 46117/99, judgment of 10 November 2004

environmental protection.[183] Under the European system, as mentioned, there is a strong chance that a State found at fault to the Convention must change their legislation to reflect the Courts negative ruling. This has the benefit of preventing future cases, thus making the litigation a boon for future generations as well.[184]

Given both the jurisprudence and the range of books covering the ECHR's expansion into environmentalists' terrain,[185] it is surprising that there is not yet any concrete discussion of the derived-rights relative to environmental justice concerns. Although the Court is expressly not an appeals court, and the European Convention on Human Rights (ECHR), which it oversees, is not an instrument guaranteeing any rights to the environment,[186] the European Court has clearly shown that environmental factors and national authority decisions on how to use the environment can impact the rights that the ECHR does explicitly recognize. In addition to situations where a State Party has violated a right via their environmental actions or inactions, the Court has shown a willingness to interpret the Convention as imposing limited positive obligations on States to secure the rights guaranteed via there environmental actions (and inactions). These positive obligations on the State have been voiced specifically in both environmental contexts and non-environmental contexts.

In light of the expansion there have been calls for a formal protocol clarifying the Convention's commitments to environmental situations. One example was a call to recognize procedural rights to environmental protection.[187] Though the talk of substantive rights has been great, the attempts to put one in to place have been less, but certainly not absent, especially where toxics and imminent danger are concerned. Reasons for the limited explicit uptake lay with the problems outlined in Section 4.1 and can be found discussed at length

[183] This is a topic though which needs more research, especially from a victimology standpoint.

[184] The Court's ruling may, indeed leave no alternative to the national jurisdiction other than to change the national law. e.g. *X and Y v. the Netherlands* judgment of 26 March 1985, A/93. cf Alkema, p. 44. For discussions on environmental justice vis-à-vis intergenerational justice, see recently Hiskes, Richard P. *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice*. Cambridge University Press, 2009.

[185] Especially official books by the CoE itself, like Council of Europe *Manual on human rights and the environment*

[186] See Ibid.; Also *Fadeyeva v. Russia* application no. 55723/00, judgment of 6 September 2005, esp. para 69; *Kyrtatos v. Greece*, application no. 41666/98, judgment of 22 May 2003. para 52.

[187] Recommendation 1614 of Parliamentary Assembly 27 June 2003, cf. San José, p. 5,n. 1

in texts.[188] The following paragraphs though lay out the human rights dimension of environmental situations as seen from a European human rights perspective, describing what has been put down on paper, if not in the form of an explicit right. The concrete exposition, utilizing established cases connecting the environment to explicit rights in the convention, illustrates both how broad the European Court has gone, the potential for further protection, and the potential role on environmental justice issues.

4.2.2 The Right To Life and the Environment

The most powerful human rights article available to those attempting to deal with environmental problems via a human rights claim would be an action against Article 2, which safeguards the right to life. The Court has recognized that it is the duty of States to not only protect citizens from actions of agents of the State which could result in the taking of life,[189] but also to take appropriate forward-looking, positive actions to safeguard life.[190] In doing so, they have put the onus on the State to show that, in the myriad of circumstances in which modern life can put the Individual at risk, they have met their burden in actively protecting life, and not merely refraining from taking it.[191]

The question before the ECtHR in situations where the environment puts lives at risk is not, however, whether the citizens involved had a right to a certain environment—a substantive weighing of the environmental conditions—but whether the States failure to regulate on the basis of the dangerous environmental conditions violated the positive obligations under the Convention to safeguard human life. In that sense, Article 2 creates derived obligations for the state to proactively regulate dangerous environmental scenarios that could come back to impact the right to life.

Such obligations fit within existing Article 2 jurisprudence of non-environmental

[188] Notably the recent Kravchenko/Bonnie, as a textbook treatment.

[189] Which was the primary purpose in composing Article 2., Council of Europe *Manual on human rights and the environment*, p. 25

[190] *Öneryildiz v. Turkey*, application no. 48939/99, judgment of 30 November 2004, para 71. Also *Budayeva and Others v. Russia*, application no. 15339/02 judgment of 20 March 2008, for cases in the environmental context. For general discussion, Janis/Kay/Bradley, Chap. 4.

[191] *LCB v. United Kingdom*, application no. 23413/94, judgment of 9 June 1998. Much of the high burden of protection jurisprudence comes from cases involving individuals in state custody. E.g. *Timurtas v. Turkey* application no 23531/94 judgment of 13 June 2000; *Salmun v. Turkey*, application no. 21986/93, judgment of 27 June 2000; *Anguelova v. Bulgaria*, application no. 38361/97, judgment of 13 June 2002.

threats. For example, threats to life do not only arise in situations where a death has occurred; there is a positive duty in exceptional situations where there was a danger of loss of life.[192] If danger of the loss of life via a state's failure to, say, properly regulate its police force, engages Article 2, then so does the state's failure to foreseeably protect from environmental dangers. Viewing the derivation in this way helps one to keep in mind that the danger must be clear and foreseeable; the regulations which restrain a state's use of force against human life must run parallel with the regulations which restrain a state's utilization of the environment, even if the environment's effects *against* human life are not desired.

Other Article 2 claims reveal an expressed *procedural* aspect of the positive obligations.[193] In the event of an environmental tragedy, there should be domestic procedures in place capable of determining the chain of command which failed, and hence, assess responsibility. Especially in the case where life is lost, there are strong procedural requirements to investigate emerging as positive obligations under Article 2.[194] These safeguards are only logical; "[t]he obligation is to have a certain kind of legal regime, one that by its rules of conduct, and by its machinery of enforcement, enhances everyone's prospect of staying alive."[195]

These positive obligations under Article 2 explicitly extend into environmental factors that involve both the State's knowledge of, and information pertaining to, environmental hazards as they impact human life. In *LCB v. United Kingdom*, an episode of childhood leukemia triggered a question of whether the State had a positive duty to inform the family of soldiers exposed to radiation in early nuclear weapons tests. Although the Court recognized a State's obligation to safeguard the lives of those within its jurisdiction from known hazards they also presented a test of foreseeable causality. In the case of the cancer, it was not clear that the exposure, especially at the levels in the case, could have caused the illness, at least to the degree that would trigger

[192] See *Markaratzis v. Greece*, application no. 50385/99, Grand Chamber judgment of 20 December 2004.

[193] Council of Europe *Manual on human rights and the environment*, p. 28.

[194] *Paul and Audrey Edwards v. the UK*, application no. 46477/99, judgment of 14 March 2002. The *Edwards* case found a "systematic collapse" in the state's safeguards and policy which should have operated to protect a particularly vulnerable prisoner. Other cases, including *Keenan v. United Kingdom*, application no.27229/95, judgment of April 2001, and *Osman v. United Kingdom*, application no. 23452/94, judgment of 28 October 1998, 29 E.H.R.R. 245 help define the minimum protections in the European Court.

[195] Janis/Kay/Bradley, p. 153.

a State's positive obligation to warn and prevent. A similar case, *McGinley and Egan v. the United Kingdom*,[196] established however a duty on the government to have procedures in place for individuals to "seek all relevant and appropriate information" regarding possible health risks they were exposed to by the actions of the State. Read together the cases, although acknowledging that environmental hazards can reach to human rights levels when they endanger life, limit culpability only for foreseeable consequences and instruct states to allow for informational access.[197]

Article 2 jurisprudence predicts that issues emerge most strongly in a pollution context when actors engage in regulation involving the use of the environment that can have dangerous *and* foreseeable effects on human life, becoming even more problematic when there is a lack of information flow and official procedure. The most notable case in this regard is *Öneryildiz v. Turkey*. The *Öneryildiz* case involved the death of family members of the applicant following an explosion at a garbage dump near their familys home. The Court found that the State knew and tolerated the housing, although the development was technically illegal. Remedy also failed at the domestic level, exposing the state to questions of its ability to secure Article 2 rights. This section details the arguments in more detail.

4.2.2.1 Öneryildiz v. Turkey and the Right to Life

Öneryildiz v. Turkey is perhaps *the* black-letter case in the canon of derived environmental rights.[198] The case is so prominent because it ties unambiguously the State to a positive duty to protect citizens from dangerous environmental situations, at least from dangers of which they have knowledge. And while it is often held up as a clear example of an implied environmental right inside the ECHR one should always keep in mind the central role that the magnitude and foreseeability of danger played. Furthermore, the role played by the lackluster domestic investigation of the incident, an explosion which claimed the lives of the applicant's family members, is not trivial in the outcome. The

[196] application no. 10/1997/794/995-996, judgment of 9 June 1998, para 101. See also page 154.

[197] As such, and reminiscent of the discussion in Chapter 2, there are limits to the protection of humans and their environments available via linkage to human rights like life. Notably, with very few exceptions, domestic courts do not take the view that toxic pollution is a de facto violation of the right to life. See Hancock, p. 118; Anderson.

[198] application no. 48939/99, judgment of the Grand Chamber, 30 November 2004.

handling raised questions of proper provision of access to justice under Article 13, in addition to related questions regarding destruction of property and the home under Article 8 and Article 1 of Protocol Number 1, above the Article 2 claim.

The case claimed a violation of the right to life when nine members applicant's family perished during an explosion at a garbage dump near their home.[199] The rubbish tip (landfill) started in the 1970s on an uninhabited stretch of land but soon attracted unauthorized housing, which grew into the "slums of Ümraniye."[200] The explosion killed thirty-nine people in all.

Though the residences were illegal there was no evidence of effort to enforce that law. In fact, the toleration was quite explicit; the area was under the authority of a local mayor, himself under a district council.[201] The rubbish collection was under the control of the Istanbul City Council and ministerial authorities. In 1991, the representative district council brought action against the Istanbul City Council questioning the safety of the landfill; action which led to experts deeming the tip was not in compliance with domestic regulations.[202] The government, however, hedged and initiated redevelopment plans when the district council asked for the tip to be closed and monetary compensation be paid to those forced to move.[203] The State tolerated the ongoing risk to citizens as they negotiated a way forward. This acceptance proved crucial in the Court's judgment of a violation under Article 2.[204] Clearly the situation carries some of the strongest parallels with U.S. environmental justice concerns seen in official European jurisprudence, combining minorities, powerlessness, administrative carelessness, and concentrated pollution.

Through the de facto toleration, the State could not fulfill its positive obligations under Article 2 to safeguard the lives of its citizens. This was especially

[199] Garbage dumps create significant quantities of methane as their contents biodegrade. The methane quantities are so great that they can be captured for sale as fuel. Properly managed, this is an economic side-benefit to rubbish dumps. Improper management however can leave pockets of gas poised for explosion. Methane can combust when mixed with air in proper ratios. Gerry, Alison Case Comment Öneryildiz v Turkey. *European Human Rights Law Review*, 2 2005.

[200] Ibid.

[201] Ibid.

[202] para 13.

[203] para 16.

[204] Compare toleration of danger in a different context, in *Tatar v. Romania*, application no. 67021/01, judgment of 27 January 2009. In the Court's admissibility decisions (of 5 July 2007) they moved the applicants claim of Article 2 infractions (para. 46.) to Article 8 (para. 47).

the case within the known probability of such an explosion. The Government's defense that they had no responsibility when the threat was not immediate did not suffice. Convention rights at all times must be practical and effective,[205] and, as industrial activities already garnering the attentive nature of State's via policy and permitting are, by their nature, dangerous,[206] the effectiveness and practicality of the state's protection was viewed as eroded by their toleration and slowness.

Turkey then found it hard to defend a position of either ignorance or that a level of positive protection had been reached. Further damaging, domestic remedy was rather lacking. Criminal proceedings were lodged at the domestic level against the authorities, and two mayors were found criminally negligent.[207] Their minimum sentence of jail time was later commuted to fines, and finally suspended entirely.[208] There were additional administrative legal action, ending with a monetary award to the applicant.[209] The monetary award, however, was never paid.[210] The failure of domestic remedy and oversight pushes the case more easily into human rights territory.[211]

From this situation, the European Court found that Article 2 can create derived obligations for the state to proactively regulate dangerous environmental scenarios though this outcome derives prominently from the failure of the Turkish government to mount a proper investigation into the deaths. "Where negligence goes beyond error of judgment or carelessness, the fact that no one has been charged with a criminal offence or prosecuted may amount to a violation of Art.2, irrespective of what other type of remedy there may be."[212] This in essence allowed the State to operate devoid of an incentive system aligning the interests of the supervisory organs to the interests of the residents around the tip. Where such a nexus of environmental danger, government policy, and human life exists, so does a positive duty under Article 2,[213] a positive duty that must be fulfilled by sufficiently aligning the incen-

[205] Inter alia, *Allenet de Ribemont v France*, application no. 15175/89, judgment of 23 January 1995.
[206] *Öneryildiz*, para 71
[207] para 33
[208] Gerry.
[209] para 40.
[210] para 42.
[211] Recall that domestic remedies must, in most cases, be exhausted before the European Court will hear a case. European Convention, Article 35(1)
[212] Ibid.
[213] para 91.

tives of actors involved. The Court subsequently found a violation of the right to life, along with violations of Article 1 of Protocol 1, as the Turkish courts had awarded them satisfaction for the destruction but had not yet paid, and Article 13 for the lengthy administrative proceedings which did not meet the threshold of effective remedy.

Such a strong criticism of the national government's procedures rightfully gives *Öneryildiz v. Turkey* a prominent place among the cases relevant to EHR in Europe. Here, not only did the government receive criticism for not protecting their citizens from probable danger, but they failed in providing legal pathways for rectification of the tragedy. The solidification of ideas on what role environmental protection plays in safeguarding human life lets research today firmly claim that there are derived protections to humans via their environs within the Convention.

4.2.3 Right to Respect for the Home and the Environment

Derived environmental protections also extend from the a right to respect for private and family life. Here in Article 8 of the European Convention on Human Rights, as with rights protected in Article 2, the Court has found positive obligations to safeguard the quality of private life and the amenities enjoyable in a home setting by properly regulating the external environment.[214] The concept of a right to a private life is naturally a broad notion[215] but jurisprudence has, as with Article 2, clarified when environmental issues cross into the protected sphere.

This line of ECtHR jurisprudence wrestles with definitions as amorphous as "respect", "private life," and "family life."[216] The fact that the Court wrestles and continues to allow these cases though is a broad positive for the equally amorphous idea of environmental rights, insofar as a signal that the European Court does not shy away from even more difficult interpretations than where environments encroach on protections for life itself (Article 2). With respect to difficulties, the Court must, in addition, tackle the ubiquitous concerns of

[214] See *Powell and Rayner v. United Kingdom*, application no. 9310/81, judgment of 21 February 1990. General discussions are explored in Janis/Kay/Bradley, Chap. 8

[215] See *Niemietz v. Germany*, application no. 13710/88 judgment of 16 December 1992. esp. para 29.

[216] *esp: Johnston v. Ireland*, judgment of 18 December 1986, 9 E.H.R.R. 203; *X and Y v. The Netherlands*, judgment of 26 March 1985 8 E.H.R.R. 235

derogations in the second paragraph of most stated rights.[217]

Granted, a willingness to wrestling with the issues is not the same as issuing clarifying rulings. As far as setting bright line definitions of such amorphous concepts goes, there is a noticeable hesitance on the part of the European Court, as well as the U.S. Supreme Court.[218] But in the former's case, to a level of abstraction that is helpful to the environmental justice discussion, we can say that the Court errs toward creating and cultivating a social milieu and inertia toward the establishment and maintenance of connections. They do this by leaning heavily on a doctrine of extending *margins of appreciation* to the State. The Court allows states and their own unique culture and history to decide how to weigh the connections fostered by family and a home against the larger connections and necessities of society.

Connections is perhaps just as vague a word as "family" or "private life" but has the benefit of being invariant to context.[219] Article 8 contains a unique construction relative to the rest of the Convention protocols, speaking to "respect for…" where other rights specifically connect "a right to…" something. The addition of "respect" into the phraseology has elicited caustic criticism relegating the term to "the world of manners rather than the law."[220] The raising of legal hackles is more than a matter of editorial preference. The major, if not primary, role of the European Court in many cases is to evaluate the balance of rights between people and the State; situations where rights, especially as exercised via valid choices on either side of the argument, come into conflict are the most difficult. Such situations are not aided by phrasing which leans toward "a general character of individual autonomy."[221] For the purpose of Article 8 inquiry then the invariant and therefore question of the first order becomes whether or not the affirmation or negation of the environment surrounding these connections foments and maintains connections—both similar and dissimilar from this case—in greater society.

[217]The notably exception is Article 3: Prohibition of Torture. There there are no permissible derogations. Article 2—Right to Life—however and in contrast does permit derogations in certain "absolutely necessary" situations.

[218]Although the Supreme Court has had opportunity to touch on and spark significant comment in that direction in the conservative milieu of the U.S. *See as an introduction and among many other contemporary discussions* Sunstein, Cass R. What did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage. *Supreme Court Review*, 2003 2003.

[219]A worthy point of note that the protection of family life under the ECHR presupposes the existence of a family. *See Fretté v. France*, 26. Feb. 2002, 38 E.H.R.R. 21

[220]Fawcett, J.E.S. *The Application of the European Convention on Human Rights.* 2nd edition. Oxford University Press, 1987, p. 211; cf. Janis/Kay/Bradley, p. 374

[221]Ibid.

Signatory States must put procedures in place to balance the use of the environment with often the unavoidable detriment to personal life and familial connections that utilizing environmental resources causes. The Court has already heard cases where sounds,[222] smells,[223] emissions,[224] and industrial processes[225] have encroached on the positive obligation to safeguard the home sphere.

Laying further importance on the connections of the home is Article 1 of Protocol 1, which serves to protect property and possessions. The peaceful possession requirement can trigger positive obligations for adequate compensation in expropriations by the State, especially where a State project may subject citizens remaining in the area to environmental burdens.[226] These established rights are most powerful in environmental contexts when there is an industrial nuisance coupled with a "failure to take adequate preventative measures to control these known sources of serious risk to life, health, private life or property."[227] Risks to life were illustrated in *Öneryildiz*, and similar tones for the latter connections are enunciated in *Kyrtatos v. Greece*,[228] where the relevant aspect is clearly to protect humans vis-à-vis harmful environs, but not necessarily to protect the environment for the sake of itself.

One should note though that protection of the environment itself can be a *cause* for the State to derogate from Article 8 (and Article 1 of Protocol 1) obligations. This is the case when the State would like to protect areas of their environment, especially from development, which puts conditions and constraints on the plans of individuals for their private sphere and possessions. In these situations the State is effectively securing the rights of *other* individuals, not including the applicant, to an environment that would otherwise be encroached by the applicant.[229] The State is allowed to weigh the connections

[222] *Hatton and Others v. the United Kingdom*, Grand Chamber judgment of 8 July 2003; *Powell & Rayner v. the United Kingdom*, application no. 45305/99, judgment of 21 February 1990; *Moreno Gómez v. Spain*, application no. 4143/02, judgment of 16 November 2004.

[223] *López Ostra v. Spain*, application no. 16798/90, judgment of 9 December 1994.

[224] *Guerra and Others v. Italy*, application no. 116/1996/735/932, judgment of 19 February 1998.

[225] *Fadeyeva v. Russia*, application no. 55723/00, judgment of 9 June 2005.

[226] See *Bistrovic v. Croatia*, application no. 25774/05, judgment of 31 May 2007.

[227] Boyle *Fordham Envtl. L. Rev 18 [2007]*, p. 487.

[228] application no. 41666/98, judgment of 22 May 2003.

[229] See, inter alia, *Papastavrou and Others v. Greece*, application no. 46372/99, judgment of 10 April 2003; *Chapman v. the United Kingdom* application no. 27238/95 judgment of 18 January 2001, para 82; *Fredin v. Sweden* (No. 1), application no. 12033/86, judgment of 18 February 1991; *Pine Valley Developments Ltd. and Others v. Ireland*, application no.

fostered by one side of the argument against the other, bounded by safety concerns of course.

It should be noted too that some commentators believe that the expanding readings of the Court are not a reflection of indirect rights to the environment, but a wider appreciation for national authorities' considering use of the environment as a general interest.[230] That is, the activism of finding indirect environmental rights and the restraint of allowing certain external factors to encroach individual rights are really "two sides of the same coin."[231] Indeed, this is an interesting perspective to justify the Court's allowance of "economic well-being" as a counterpoint for individual rights infringed in many environmental instances. The "economic" arguments are a proxy for the many aspects of enjoyment of rights which come into play with economic stability, jobs and job creation, and local economy.

This boils down to a coherent Article 8 jurisprudence where the European Court has acknowledged that the State enjoys a margin of appreciation—a significant amount of decision-making leeway—in determining how to strike a balance between economic interests and protection. Citizens in turn enjoy a narrowing of that margin as the danger they are exposed to increases.[232] The enunciation of the concept of margins of is important, as a defendant State will often—and likely—argue that the environmentally damaging activity is in the economic interest of the community. Such arguments are valid, but the States allowance of the damage must be proportional to the level of benefit to the community and bounded by degrees of safety afforded by other rights. Though not completely amorphous then, the concept of a margin of appreciation, while admirable in its goal of providing flexibility within reason, is not necessarily predictable. With the benefits of flexibility arrive the immediate downside of

12741/87, judgment of 29 November 1991; *Håkansson and Sturesson v. Sweden* application no. 11855/85 judgment of 23 January 1990, para 44.

[230]San José, p. 9.

[231]Mahoney, Paul Judicial activism and judicial self-restraint in the European Court of Human Rights: two sides of the same coin. *Human Rights Law Journal*, 11 1990, Nr. 1-2, cf. San José, p. 48

[232]The ECHR jurisprudence on the margin of appreciation is broad and deep. For a textbook introduction, see Janis/Kay/Bradley, p. 242-53. The general deference cases and situations arise often in cases of morality and civil discourse. But many of the points are discussed *infra* in the application of the concept of deference toward states in environmental cases. A similar narrowing occurs in the Aarhus Convention, where duty to (positively) inform of danger increases as the environmental threats become imminent. See art. 5(1)(c) and Boyle *Fordham Envtl. L. Rev 18 [2007]*, p. 492.

malleability.[233]

The approach now often taken by the Court leaves the judges addressing the proportionality and fairness of the balance—and the availability of remedy/remediation—between competing interests instead of defining substantive metrics of respect for family life.[234] When dealing with such potentially threatening environmental tradeoffs such as disposal or use of hazardous materials and waste, the State would have limited recourse to economic justifications. Even if allowed, the activity would have to conform to local regulations and permitting, as well conforming to the positive obligations put on the State to allow access to information concerning dangerous activities that potentially infringe on Article 2 and 8 rights, dictated by Article 10.[235]

There are several cases which have helped the European Court define the nexus of environmental connections to Article 8 duties and, along the way, elucidated this idea of margins of appreciation. The following cases illustrate the situation with specific detail.

4.2.3.1 Hatton v. the United Kingdom: Margins of Appreciation

The case of *Hatton and Others v. The United Kingdom*[236] plays a central role in ECtHR cases alleging a violation of Convention rights perpetrated through environmental decisions. Here, an environmental burden need not threaten lives but rather—and rather simply—threatens the enjoyment of daily life itself. Most prominently, it establishes a "wide margin of appreciation" for State parties in balancing the interests of the individual against the needs of the community.

The *Hatton* case revolves around night flights coming into Heathrow Air-

[233] Janis/Kay/Bradley, p. 255.

[234] San José, p. 50 As an enlightening example of a very early balancing of health versus polluting activities, consider the question of what to do about air pollution from burning coal in 17th Century London. Although the air was dirtier, there was evidence of less deaths than in the "cleaner" cities of Liège and Paris. Some of the variation in deaths was postulated to be from the availability of cheaper heating materials (coal) in London. Naturally, the science at the time leaves much to be desired would we wish to debate the situation using today's standards. At the time, however, how would one have gone about setting policy or deciding when rights (to life or home) were infringed? cf. Brimblecombe, Peter *The big smoke: a history of air pollution in London since medieval times*. Methuen, 1987. The story is eye-opening, if not instructive, to bear in mind when we tackle issues today where scientific uncertainty or limited knowledge play strong roles in the policy discussion.

[235] Council of Europe *Manual on human rights and the environment*, p. 17. For a discussion of the positive obligations to allow access to information, see Section 4.2.4

[236] application no. 36022/97, judgement of the Grand Chamber, 8 July 2003

port and the disruption the regulated flight patterns had on the surrounding neighborhoods' inhabitants. The disruption was severe enough to warrant an inspection of Article 8 rights promised by the European Court.[237] The case was seen as a new test for the wider margins of appreciation left in a similar cases, *Powell and Rayner*,[238] which also addressed the government's balancing of the needs of the community and the rights of the individual.[239] *Hatton* revolved around noise complaints and the right to a satisfactory home life in the neighborhoods surrounding Heathrow Airport. Although common law remedies did exist, their power to satisfy the complaints within domestic law were demonstrably truncated. The truncated powers were not, however, found in violation protection to access the Courts or effective remedy. The proper functioning of the appeals and administrative system then satisfied the State's positive obligations toward being able to balance society's use of the environment and the rights to family life enjoyed by those local to the airport.

The Court's logic was that, where health effects and the environment were potentially impacting Convention rights, the State had two obligations. They first must minimize interference with rights by exploring alternatives or options and secondly must conduct complete investigations and fact-finding missions into fleshing out these solutions.[240] Article 38 of the Convention binds the States to "furnish all necessary facilities" necessary for an investigation and to "assist the Court as needed."[241] By burdening a State to carry a substantial inquiry in seemingly all such cases, the Court put procedural requirements on the establishment of the margins of appreciation left to national authorities. Further, should those procedures be insufficient, there is nothing to preclude a domestic finding of innocence from being referred to the Court.[242] The Court, however, stops well short of repeating national investigations when contentious points arise in front of them. Here there is clear deference to national, heterogenous, systems and a subsidiary role of the European Court, so long as the particular methods utilized at the national level meet the minimum standards

[237] The case also claimed violations of Article 6 and 13 of the European Court.

[238] *Powell and Rayner v. United Kingdom*, application no. 9310/81, judgement 21 February 1990.

[239] Hyam, Jeremy Hatton v United Kingdom in the Grand Chamber: One Step Forward, Two Steps Back? *European Human Rights Law Review*, 6 2006.

[240] Ibid.

[241] Janis et al. (2008) note that specific commitments were fleshed out and added out of frustrations with previous investigations, such as *Timurtas v. Turkey*, application no. 23531/9413, judgment of 13 June 2000. See Janis/Kay/Bradley.

[242] e.g. *Eğdgs v. Turkey* 27 July 2004.

for enabling Convention rights.[243]

The problem here in *Hatton*, then, was how to weigh the cases when there were two very convincing claims. Procedures allowed for appeal had failed to find a compromise where local residents felt as though their rights were fulfilled. A further restriction of night flying would have a deep impact on local and even nation-wide economics. On the other hand, the neighbors of the airport were suffering a heavy burden dealing with the interruption in their sleep and their enjoyment of familial connections within the home, which was a potential failure of the State to protect their right to private life. The environmental degradation at hand was both *direct* and *serious* enough to trigger scrutiny of Article 8,[244] that is, to surmount admissibility criteria.

How did the Court compare apples and oranges in a transparent fashion?[245] In the end, the Grand Chamber left the matter open to the State, overturning the lower Chamber's decision, by reaffirming their commitment to allowing wide margins for domestic regulators to best strike a bargain between economics and home life.[246] The Grand Chamber saw no reason to "adopt a special approach in this respect by reference to a special status of environmental human rights."[247] Although the residents were not satisfied with the choices made by the State, the Court found that the State had indeed taken their concerns in to consideration, at least enough consideration to surmount concerns and land the State safely in their margin of appreciation. And although the situation was grounded in the control of night-flights, differentiating it in scope from the earlier *Powell & Rayner v. the United Kingdom*, there was not enough reason given by the intrusions into the private sphere to warrant overturning the State's judgment on the margins of the balance.[248]

Notably to this case, there was no evidence of a decrease in home prices, meaning that the economic improvement claimed by the State, while potentially coming at the expense of the enjoyment of life for the residents at that

[243] Janis et al. note that the Court may be more receptive to facts from domestic cases with the elimination of the Commission as a filter to the Court, *see* Janis/Kay/Bradley, p. 165, citing *McKerr v. United Kingdom*, application no. 28883/95, judgment of 4 May 2001.

[244] *Hatton* para 96.

[245] See dissenting opinions by Judges Greve and Kerr, who question how tightening the margins in this case does not mesh with the existing case law.

[246] Noting the judgement of *Buckley v. the United Kingdom*, application no. 20348/92, judgment 25 September 1996, also establishing precedent for wide margins to States in planning issues.

[247] para 122

[248] San José, p. 34.

location did not prevent or reduce the ability for the residents to enjoy their possessions elsewhere.[249] Boyle notes, as did the Chamber judgment and dissenting Grand Chamber opinions, that the State did not demonstrate explicitly the value of the night flights (the intrusion) however and so one has nothing against which to weigh any changes in value. In absence of this assessment, one sees an even greater deference to the State's policy in the abstract than the usually concrete comparisons detailed in a margin of appreciation argument. The Court, while reaffirming and indeed solidifying its previous stances on granting wide margins of appreciation to domestic authorities, and focusing their own investigation on whether the domestic authorities gave enough thought, time, alternatives, and weight to alternatives and proper procedure, refrained from widening the path toward environmental rights via Article 8.[250]

The Court clearly stated though that it was not a question of whether the duty to secure a right to a private and home life under Article 8 was analysed as a positive obligation or negative duty.[251] From either perspective, the Court must determine whether a fair balance was struck. The implicit wide margin afforded to the State was filled by the many measures taken to control and regulate the noise and annoyance experienced by any neighbor. These included abatement protocols and barriers, noise certifications for aircraft, night flying restrictions, noise monitoring points, alternate runway usage, and grants to homeowners for sound isolation. The measures put in place must, in the eyes of the European Court, be proportionate to the aim of the domestic authority in encroaching on rights. In this case, the abundance of measures put in place to mitigate the negative aspects of the otherwise (ostensibly) lucrative benefits of expansion at the country's largest air center satisfied the Court's scrutiny.

A recent comparator case comes from *Taskin v. Turkey*,[252] where the domestic courts failed, in the eyes of the European Court, as the weighers of public interest. The outcome is important as Article 8 provides no explicit procedural requirements; the process must only be fair and afford due respect for interests of individual as safeguarded.[253] Both questions of proper procedure and the levels of permissible environmental invasions into the home

[249] cf. Boyle *Fordham Envtl. L. Rev 18 [2007]*.

[250] Hyam Although the access for complaints stands in notable contrast to the narrowing of standing for environmental complaints in the U.S., analogous to this issue.

[251] *Powell & Rayner*, para 41. Also *Hatton & Others*, para 98.

[252] application no. 46117/99, judgment of 10 November 2004.

[253] *McMichael v. the United Kingdom*, application no. 16424/90, judgement 24 February 1995.

came to the forefront in *López Ostra v. Spain*, which further illustrates the Court's grappling with defining margins of appreciation, and when the State's decisions lie within that sphere.

4.2.3.2 López Ostra v. Spain: The Levels of Environmental Damage

Like *Hatton*, *López Ostra v. Spain*[254] is bound to be cited in any human rights complaint stemming from environmental complaints. The case involved an applicant whose house sat near a treatment plant for liquid and solid waste from the tannery industry, continuing the thread of "living near unpleasantness" running throughout the cases. Also related is the lack of effective oversight; the plant began operating without a license and soon after suffered a malfunction which released gases into the surrounding the community. The plant had also been built with subsidies from the State,[255] therefore pulling the State into the nexus of responsibility although the pollution was not directly the fault of the state, as it was with decision making in *Hatton*.[256]

In response to the health problems and nuisance caused by the emissions the town relocated those affected to the city center, away from the emissions. The treatment plant though continued to operate with few new restrictions[257] and the regulations already in place did not address human health risks. The lacuna gave weight to the applicant's view that the authorities took a passive stance in a matter which bore on their Convention rights. The continued operation, lack of health-focused responses, and questionable relocation policy brought issues of interference with the home, ability to choose place of residence, physical and psychological intrusions, and infringements of liberty and safety to the forefront.[258]

This case shows first the important doctrine of the European Court of relying strongly on the decisions of domestic courts in evaluating any *subjective* qualities relevant to the human rights question. [259] The domestic decision

[254] application no. 16798/90, judgment 23 November 1994

[255] para 7, 52.

[256] There was a nexus of connection to State action and thus this is not purely a case the Convention's *Drittwirkung*.

[257] Operating through 1993, having begun operations without their permit in 1988.

[258] The fact that another plan had gone into effect by the time of the case reaching the ECHR was immaterial. The present facts could be a factor in assessing damages but not in determining the extent of human rights violations. *L'opez Ostra* para. 42, citing *Marckx v. Belgium* judgment of 13 June 1979, Series A no. 31, pp. 13-14, para. 27; and *Inze v. Austria*, judgment of 28 October 1987, Series A no. 126, p. 16, para. 32.

[259] See also the more recent *Giamcomelli v. Italy*, application no. 59909/00, judgment of

makers already acknowledged the danger in their decision to relocate affected individuals and, at a level removed from immediate risk, that the emissions were a nuisance, recognized the life-impairing quality of emissions that were not in and of themselves dangerous to health. The domestic actions thus become the cultural thermometer for the Court. With the judgement of the domestic courts cementing the fact that the local laws considered the situation to be problematic to the applicants, the Court could set to work on the very important question of how to analyze the question of infringement.

In moving again toward assessing margins of appreciation, the Court noted that it could analyze the situation through either a positive obligations or negative duties lens, as the two approaches are, in fact, "broadly similar,"[260] having acknowledged that

> "[i]n both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8 (art. 8-1), in striking the required balance the aims mentioned in the second paragraph (art. 8-2) may be of a certain relevance. . . "[261]

The Court first articulated that the positive approach as an area where they would have limited competence, allowing thus for a more fixed, wide margin of appreciation, but have since then moved toward clarifying and solidifying where they will and will not tread in dictating adjustments to that margin.[262] The Court here defined its task—and its future tasks in similar circumstances—"not as determining what level of environmental quality is compatible with the enjoyment of protected rights, but as ensuring that de-

2 November 2006.

[260] *Guerra* para 51

[261] See, in particular, *Rees v. United Kingdom*, Series A no. 106, judgment of 17 October 1986, p. 15, para. 37, and *Powell and Rayner v. United Kingdom*, para. 41.

[262] See *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, application no. 9214/80; 9473/81; 9474/81, judgment of 28 May 1985: "especially as far as those positive obligations are concerned, the notion of respect is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notions requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and the individuals." (para 67)

cision to tolerate activities conducive to environmental degradation are based on a process that duly takes individual interest into account."[263] The Court then only looked at the issue of whether the State adequately secured the right to a home and family life for the applicants.

Here, as in newer cases, the environmental damage and therefore infringement on rights guaranteed must reach a certain level before it breaches the margins allowed to the State and triggers Convention protection.[264] The Court clarified this in *Kyrtatos v. Greece*,[265] where the level of activity and environmental damage, although done in an unlawful manner implying a poorly established balance by the State, was ruled not to reach the levels of subjective damage needed for an infraction of Article 8. The case by case approach to weighing margins appeared also in *López Ostra*, where the Court found it relatively easy to delineate the scope of the claim as within the boundaries of home, private, and family life as stated in Article 8, but did not elaborate on defining the nexus. The absence of clarifying words leaves an evaluation of environmental detriment to familial connections to be evaluated on a case-by-case basis. That is unfortunate in the sense that lawyers do not even know if the Court will distinguish the sphere of "home" as separate from the spheres of "private and family life," to say nothing of defining the borders of either. For instance, would this case be as clear cut if the environmental pollution had only affected the applicants at their place of employment?[266] Since that time, the Court has seemed to favor viewing environmental pollution's encroachment as hindering "family life" as opposed to the more limited viewing of direct effects on "the home."[267] That is, familial connections seem to draw the weight of infringement analysis, drawing a protected sphere around the private sphere.

While this remains an open question, building from *Hatton* and *López Ostra* shows that the European Court is up to the task of challenging the State to explain its behaviour in regulating the environment. A State who steps on connections engendered by family and private life while deciding environmental

[263] Desgagné, Richard Integrating Environmental Values into the European Convention on Human Rights. *American Journal of International Law*, 89 1995, p. 791.

[264] Ibid., p. 790.

[265] *Kyrtatos v. Greece*, application no. 41666/98, judgement of 22 August 2003.

[266] Ibid., p. 789. See also *Niemietz v. Germany*, application no. 13710/88, judgment of 16 December 1992para 29,30.

[267] Noted by Kovler, J in Concurring Opinion to *Fadeyeva v. Russia*, application no. 55723/00 judgment of 9 June 2005.

usage puts itself in a position to be questioned on human rights grounds. Following from the acceptance of cases by the ECtHR then situations which could reach this level must have procedures and remedies in place to question and prevent the situations from reaching to the ECtHR too. And when the State cannot show an adequate balancing of rights between parties, the Court will step in to evaluate.[268]

In *López Ostra*, the treatment plant may have been in the economic interests of the town, but there was little weight on that side of the argument, given the years of pollution the residents endured without responses from the government regarding the non-existent regulation. Even if there was an economic benefit, the State went little way toward striking a balance between rights and economic well being, and neglected the process afforded to those affected in the meantime. The State was found to be in violation of Article 8 of the Convention. And more recent cases have backed up the logic found here as well as extended the Court's willingness to weigh margins of appreciation.

It bears mentioning that weighing margins of appreciation does not place judges outside of their competences. It does not place judges in the main in a binding situation asking them to weigh specifics or measurements.[269] Judging whether the State met its burden in considering sound insulation and noise-abatement in increasing the size of an airport, both of which fit into the general need for active consideration on the part of States in protecting home life, has been demonstrated to be different than the court judging particulars such as whether a police force is sufficient for protection.[270] The crux is for the respondent State to show that they have given life to the obligations under the Convention, and that burden is most easily adjudged against the backdrop of an active legal regime.

[268] See also page 4.3.2.3.

[269] E.g. in *X and Y v. the Netherlands*, application 8978/80, judgment of 26 March, 1985 we see a clear ability to weigh the prevailing legal regime versus the positive obligations implicit in Article 8 against. Also *Hatton & Others v. United Kingdom* shows a willingness to weigh individual steps taken by the government in order to assuage their positive obligations under Article 8.

[270] *Arzte für das Leben v. Austria*, application no. 10126/8221 judgment of 21 June 1988.

4.2.3.3 Fadeyeva v. Russia: Health and Promises

A final illustration of the Court's protection of the environment via Article 8 comes from the case of *Fadeyeva v. Russia*.[271] Here we find a small town pitted against regulations promulgated in the Soviet era to establish a safety zone around a large and economically important steel manufacturing plant. At its height, the smelter employed 60,000 workers,[272] and produced pollution significant enough to warrant a 5,000 meter wide "buffer" area, chosen by the government, where people were prohibited from living. The prohibition, like the *Öneryildiz situation* had little practical effect, however.

Pollution output later caused a widening of the buffer area, as the plant fell under regulations forcing it to adhere to more rigid pollution requirements. Residents living inside and close to the new buffer zone were suppose to be re-housed. The rehousing, however fell under funding restrictions and there was a waiting list for 6,820 people looking to move. Again, as in previous cases, the the decision to analyze the case on grounds of Article 8 disturbances did not then fall on a subjective judgment of the impact the pollution had on the occupants. Though the complainants brought forward current illnesses, they could not conclusively prove their current illnesses to be linked to their home's location inside the buffer. It was much clearer that the pollution negatively affected their home life, without addressing direct health impacts. In light of cases like *LCB v. United Kingdom*,[273] the ability of environmental cases to steer clear of having to directly link environmental pollution or hazardous exposures to medical conditions is quite interesting for the expansiveness of the human rights pathway. *Fadeyeva* shows there must be a direct link between the environmental problem and the civil right at stake, but not to the health situation.[274]

The *Fadeyeva* case is similar to the above cases in that situations which gave rise to a question of Article 8 rights are frequently predicated on problems within the domestic legal apparatus to comply with its own findings.[275] Specif-

[271] application no. 55723/00 judgment of 30 November 2005.
[272] para 11.
[273] application no. 23413/94, judgment of 9 June 1998.
[274] This applies most directly to questions of access to fair trials under Article 6. The Court has stated that, in the case of environmental disputes, "tenuous or remote" consequences of environmental situations to secured rights are not sufficient to warrant Court oversight. cf. Council of Europe *Manual on human rights and the environment*, p. 18
[275] Kotzeva, Anna Towards environmental accountability. *New Law Journal*, 155.7184 2005.

ically here they failed to execute their judgements—rehousing—in a manner which appeared to the Court to adequately guarantee rights to protected family life spheres, a sphere recognized explicitly (and geometrically) by the State itself in setting the safety barrier. The bumbled rehousing was also a disturbing factor for *López Ostra*.

The *Fadeyeva* case though explicitly cemented some criteria necessary to raise Article 8 claims from environmental pollution. The claim must, first and foremost, directly affect the applicant's home, family, or family life.[276] The direct effects must also reach a certain minimal threshold. This is illustrated in the recent case of *Fägerskiöld v. Sweden*,[277] the Court found that noise and light pollution caused by a new windmill did not reach the threshold of damage required to trigger questions of infringement of private sphere rights. The windmill provided a positive economic benefit in the form of energy for 40-50 houses, which offset the limited noise pollution incurred by those in the direct neighbourhood. To ensure the noise pollution remained low, and to surmount its duty to positively balance the benefits and the negatives, the government had placed restrictions on its operation designed to limit its highest noise levels. And while the threshold depends on the specifics of the case, it must be higher than the environmental problems implicit in modern city life.[278] These statements outline more definitively criteria on the environmental nexus of protection.

Most importantly, from the *Fadeyeva* case we find the Court imploring the State to "justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community."[279] There is a clear environmental justice subtext to the Court's statement, and begs whether it could be restated as a requirement for the State to justify the burden on a subset of the community? That is perhaps a bit too far to interpret at the moment but merits attention. In either respect, the case shows, to the benefit of the community, that the duty to prove the connection between environmental problems and Article 8 rights can be surmounted by "clear and concordant inferences" or "similar unrebutted presumptions of fact" because the more rigorous information may be in the hands of the defendant,

[276] Kotzeva.
[277] application no. 37664/04, inadmissible, 26 February 2008.
[278] para 69.
[279] *Fadeyeva*, para 128.

and therefore unavailable to those alleging the infraction.[280]

The case also marked an unprecedented willingness of the Court to wade through difficult domestic legislation, speaking directly against concerns of the Court side-stepping quagmire cases. The time frame involved in the material facts of the *Fadeyeva* case straddled communist-era and post-communist Russia, with regulations from both eras being interpreted in light of Russia's accession to the ECHR.[281] But the complexities could all be boiled down to the State's lack of action toward the ends it itself aimed for in regulations.[282] Legal difficulties did not deter the Court, as they lay within the competences of the Court, and the idea that previous domestic decisions could solidify a conception of a substantive environmental on which the European Court could hang its hat was set in concrete. Whether or not the Court will tackle environmental questions where the substantive impact of the pollution are not already decided by the domestic courts though remains to be seen.

4.2.3.4 Conclusions on Connections to the Home

These three cases spell out how the Court has, slowly but surely, evaluated situations of environmental degradation impinging on Article 8 rights. In brief, where environmental problems are severe enough, and have been evaluated so by domestic action affecting regulation or other protective actions, the State must remain aware and justify their impact on those whose private lives stand to suffer. The focus is the connection between a private sphere and burdensome environs, and health outcomes remain on the fringe of the discussion. Where the State has taken the citizen and their Article 8 connections into consideration, they have already started down the correct path for balancing interests. Should they have failed to do so, they are already at risk of having violated Article 8's balancing test. There is certainly no right to home ownership here, nor is there a right to a certain measurable quality of environment surrounding one's home. What there is though is a recognition that a State's failure to double-check their permitted uses of environs can rob its citizens of any usable protection of their home, family, or possessions.

Implicit in much of this conversation and the views on balancing rights,

[280] para 79.

[281] Russia ratified the Convention on 5 May 1998.

[282] Also see *Case of Ledyayeva, Dobrokhotova, Zolotareva, and Romashina v. Russia*, applications nos. 53157/99, 53247/99, 53695/00 56850/00; judgment of 26 October 2006; cases which also came from the same Severstal steel plant and situations.

economics, and the home sphere is the need for equitable information flows among participants. Balancing is an active process, with all participants informed, a dynamic which points to the central role that information flow plays in enabling rights. Indeed, the dynamics of information flow regarding the environment deserves greater explanation. The following section explores the role of information explicitly in the ECHR.

4.2.4 Rights to Information

Article 10 of the ECHR safeguards the right to receive and impart information. While it does not impose a positive duty on the State to collect and disseminate information,[283] it does secure a right to access information, especially information relevant in a citizens decision to bear risks. A duty to provide relevant information grows proportionally with the risks involved, though the leading case on this issue, *Guerra and Others v. Italy*, shows that any danger quickly moves toward violation of Article 8 and safety concerns.[284] If the information is not available, then it is hard to show either that the State has considered impacts at any level, or that citizens have had access at any relevant level to any decision-making discourse. That pushes against the safeguards for home and private spheres described in the previous paragraphs.

The limited Convention-based rights to environmentally relevant information is now backed-up by the United Nations Aarhus Convention, a broader right pushing toward imparting information rather than simply allowing access.[285] The Aarhus requirements are further supported by European environmental law.[286] The additions reinforce the importance of information within

[283] *Guerra and Others v. Italy*, application no 116 /1996/735/932, Grand Chamber judgment of 19 February 1998, para 53.

[284] Council of Europe *Manual on human rights and the environment*, p. 53; note recently *Budayeva and others v. Russia* application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 judgment of 20 March 2008; along with *Öneryildiz v. Turkey* discussed above.

[285] Boyle *Fordham Envtl. L. Rev 18 [2007]*, p. 491.

[286] Ibid., p. 490, noting Council Directive 2003/4, 2003 O.J. (L 041) (EC). See Council Decision of 17 February 2005 (2005/370/EC) on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters). Also Council Directive 2003/4/EC of 28 January 2003, on public access to environmental information and repealing Council Directive 90/313/EEC. Also Council Directive 2003/35/EC of 26 May 2003, providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC. All decisions and directives can be found at `http://ec.europa.eu/environment/aarhus/index.htm\#legislation`

the environmental/rights discourse.

From the cases above, the European Court recognizes that environmental damages can infringe on the negative rights to life and the home sphere. The government is restricted in these areas normally, and in environmentally situations their failure to act to secure the environment leads to a failure to "not interfere" in the individual's protected space. But individuals need information as to the environmental quality to which they are exposed, including the polluting activities of local firms, in order to have any hope of keeping the State in check. Article 10 of the Convention serves to push toward access to information held by public authorities engaging in health/environment trade-offs though it stops significantly short of forcing any level of information exchange.

Nevertheless, as *Guerra* shows, in cases involving environmental use and abuse, Article 10 rights can impact the individual's ability to obtain satisfactory Article 2 and Article 8 outcomes, bookending an incursion into the home with the potential issue of withholding information. This is yet another forward-focus of the Convention, with momentum backed up by extra-Convention law like the Aarhus Convention.[287] So while the facts of the case do not speak to a strong requirement of information exchange in environmental matters, they do press the role information plays in securing rights and proving positively fulfilled obligations towards those rights.

4.2.4.1 Guerra and Others v. Italy: Access to Information

The case of *Guerra and Others v. Italy*[288] cements the importance of information exchange in environmental matters. The ruling stops short of placing requirements on the government to collect that information but nevertheless allows the lack of information to play a supporting role in violations of Article 8.[289] The case involved complaints on Articles 8 and 10 in relation to the toxic emissions from a local chemical plant. The applicants complained that the State failed to act, therefore failing in their positive obligations to protect

[287] See Section 4.2.4.2

[288] application no 116 /1996/735/932, Grand Chamber judgment of 19 February 1998

[289] The US, by way of contrast, has legislation that mandates collection of data on toxic releases (the Toxic Release Index), based on a philosophy of a community's right to know. Bowen, William M *Environmental Justice through research-based decision making*. Garland Publishing Taylor & Francis Group, 2001, p. 6 . This is, however, a small part of pollution releases of which communities might have the need to know.

private and family life by not releasing requested information for the families to assess their own risks of living near the factory.

The families involved lived around a chemical plant which had been judged a "high risk" by existing regulations.[290] Accidents involving arsenic exposure had already occurred, and the factory was non-compliant in several areas of inspection. Affected citizens eventually initiated criminal proceedings against the managers for this non-compliance as well as the existing pollution. Although the directors were fined and faced jail time, the sentences were later remitted while awaiting more information regarding rationale for the lapsed permits and quantification of the environmental damage.

The case as it appeared before the European Court is interesting in that it is one of the exception cases that continued although domestic remedies had not yet been exhausted. The Court noted here that the domestic remedies available would not have enabled the applicants to achieve their aim anyway, even if it were successful on its merits, and therefore were not relevant to the discussion.[291] This finding puts a limit on the otherwise standard requirement to exhaust domestic remedies;[292] ineffective remedies are not remedies for the sake of exhaustion.[293] A corollary is that the Convention does not require a right to actually be violated to raise an actionable issue. As the ECHR requires under Article 13 States to have the possibility or remedy,"... [i]n the Court's view, Article 13 requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress. Thus, Article 13 must be interpreted as guaranteeing an 'effective remedy before a national authority' to *everyone who claims* that his rights and freedoms under the Convention have been violated."[294] Further, the ruling continued the trend in *López Ostra* where criminal proceedings did not have to run to completion before raising human rights issues with the Commission.[295]

[290] Council Directive of 24 June 1982 on the major-accident hazards of certain industrial activities (82/501/EEC) (Seveso I or Seveso Directive).

[291] *Guerra*, para 49.

[292] Article 35(1)

[293] The legal maxim, "where there is a right, there is a remedy" is fitting here. See Holmes/Sunstein.

[294] *Klaas v. Germany* Series A, No. 28, (1979-80), judgment of 6 September 1978. para 64.

[295] As the case took place in 1998, there was still a separation between the European Commission on Human Rights and the European Court. The original intent was to have

Above the modification of the domestic remedy rule, the *Guerra* ruling specifically addresses positive obligations to information flows. The wording of Article 10, which secures the freedom of expression, is predominantly concerned with possible derogations from the absolute right. The derogations allow for states to truncate expression and its intrinsic ability to spread information "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[296] As such, the State in the *Guerra* case claimed that there is no positive obligation to distribute information in the hope of protecting health of morals, but only a negative obligation *not* to hinder information or expression when it would not be to the detriment of health and morals.[297]

Indeed, the prevailing EC directives[298] spoke only of access to information in environmental matters, not of providing information.[299] The Commission which reviewed the case before sending it on to the Chamber however supported the applicants' view that Article 10 did in fact support a positive freedom to receive information, based partly on the underlying facts of Italian law which recognized a duty to collect, process and disseminate information.[300] Here again there is a connection with the implicit substantive thermometer of domestic precedent. It was not sufficient however for the Chamber to find a domestically-guaranted right.

The Chamber thought there was a more literal interpretation. The case law surrounding Article 10 notably focuses predominantly on freedom of press issues, and in light of that a positive duty construction was a stretch.[301] The

---

the Commission shield the Court from "a possible deluge of individual complaints, a function hat also protected the traditional sovereignty of the member states." Janis/Kay/Bradley, p. 25 Recall that there was concern during negotiations of the Convention with respect to the perceived handing over of national jurisdiction for human rights-related issues.

[296] Article 10(2)

[297] Sunstein discusses some of the paradoxes of disclosure rules as a form of regulation, showing that it is not always the case that they are beneficial for citizens. See Sunstein, Cass R. *Free Markets and Social Justice*. Oxford University Press, 1997, p 284-285

[298] Directive 90/313/EEC, repealed by Council Directive 2003/4, 2003 O.J. (L 041) (EC): *on public access to environmental information and repealing Council Directive 90/313/EEC*.

[299] *Guerra* para. 51.

[300] *Guerra* para 52.

[301] For recent comments on rights and responsibilities of the Press in information dissemination, see *Steel and Morris v. United Kingdom* application no 68416/01 judgment of 15

freedom of expression could not be construed as placing a duty on government to collect and disseminate information. The lack of a ceiling on such requirements would, indeed, make compliance quite an opaque undertaking. What level of information collection and dissemination could assure the government in all in all situations of absolving its liability? This was, however, one of the few strikes against positive rights emerging relative to information supply in environmental case law.

The applicants were more successful with direct complaints that the government failed to protect their Article 8 rights to private and family life. The State relied heavily on a defense of non-interference with Article 8 rights; that is, they did not violate their negative duties to abstain from interfering.[302] The Court, consistent with *López Ostra*, noted that the government did not meet its positive duty. The situation showed that the applicants had applied for information but waited all the way up until production at the polluting facility finally ceased, without receiving it.[303] That information was crucial, in the Court's eyes, for the applicants to be able to judge for themselves whether to continue living inside the risky area. That itself is a violation of a Contracting Party's duty under Article 8.[304] The lesson emerging from the *Guerra* case then acknowledges the possibility of a stronger obligation to actively inform or disseminate information in situations involving imminent injury or serious health risks,[305] and impacts on the health of the family sphere, but stops short of requiring a state to collect or actively disseminate all environmental information.

Thus, the *Guerra* case is important for how it clarified the borders of positive obligations arising from information in environmental matters. It rejected the idea that there is an absolute duty for a State to collect and disseminate information on environmental matters, opting instead for a lesser but more transparent requirement for the government to supply timely information for families to decide for themselves what hazards are and are not acceptable in

February 2005; *Vides Aizsardibas Klubs v. Latvia*, application no. 57829/00, judgment of 27 May 2004.

[302] *Guerra*, para 58.

[303] para. 60

[304] For discussions on the ability of a State's internal organs to remain independent and impartially relate judgements, a topic which could become an issue in conjunction with positive duties to disseminate—as opposed to suppress—environmental information, see *Bryan v. the United Kingdom*, case no. 44/1994/491/573, judgment of 25 October 1995.

[305] Boyle *Fordham Envtl. L. Rev 18 [2007]*.

pursuit of their fundamental right to respect for home and family life.[306] The ruling fits well beside the margins of appreciation logic that allowances shrink when dangers increase, as confirmed by the recent *Tatar v. Romania*.[307] There is still grey area as to what particulars of environmental dangers do to shrink or loosen the margins of appreciation dedicated to the State to decide how much information is enough. Nevertheless, *Guerra* puts states on notice that they could be liable for human rights damages should they not pay attention to information gaps as part of their encompassing environmental regulation policies, and as such *Guerra* is now listed quite commonly alongside *López Ostra* in discussing rights and the environment.

4.2.4.2 Aarhus Convention

Mentioned but not yet discussed as an auxiliary instrument for European environmental information is the The Aarhus Convention—or more formally, the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters—was finalized by the UNECE in 1998. As a treaty outside of the European Union framework, it took some time to be ratified and is now slowly coming into full force with new domestic and European Community legislation being added to guarantee full compliance. It is the first multilateral agreement focused on imposing obligations, and not just establishing goals, of environmental quality for a signature country's citizens.[308] The duties follow the words of Jean Rostand, quoted in Rachel Carson's *Silent Spring*: "The obligation to endure gives us the right to know."[309] It merits mention here as it stands to play the positive roll in information exchange to which *Guerra* did not reach.

Motivation for this powerful informational supplement derived, at least in part, from a desire to quickly bring the newly independent countries of the Soviet bloc in eastern and central Europe in compliance with EU environmental

[306] In this respect, also note *McGinley and Egan v. the United Kingdom* application no. 10/1997/794/995-996, judgment of 9 June 1998.

[307] An original claim against Article 2 due to toleration of dangerous mining operations was moved to a claim of Article 8 and questions of information needed to make informed decisions on private and family life. *Tatar v. Romania*, application no. 67021/01, judgment of 27 January 2009. In the Court's admissibility decisions (of 5 July 2007) they moved the applicants claim of Article 2 infractions (para. 46.) to Article 8 (para. 47).

[308] Pallemaerts, p. 18.

[309] Carson, Rachel *Silent Spring*. Boston: Houghton Mifflin, 1962 (2002), p. 13.

standards.[310] In fact, the Aarhus Convention now covers all of Europe, the US and Canada,[311] and also parts of Central Asia, focusing on access to justice via granting the rights of all to first *receive* environmental information and second to *participate* in environmental decision making. Reflective of the logic of the plaintiffs' claim in *Guerra*, access to justice should be secured via access to information held by public authorities and by allowing that information to be utilized by public participants in changing forward-looking decisions on environmental use and non-use.

Officially, the Aarhus Convention secures

- "the right of everyone to receive environmental information that is held by public authorities ('access to environmental information'). This can include information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment. Applicants are entitled to obtain this information within one month of the request and without having to say why they require it. In addition, public authorities are obliged, under the Convention, to actively disseminate environmental information in their possession;

- the right to participate in environmental decision-making. Arrangements are to be made by public authorities to enable the public affected and environmental non-governmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment, these comments to be taken into due account in decision-making, and information to be provided on the final decisions and the reasons for it ('public participation in environmental decision-making');

- the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general ('access to justice').[312]

The reflection of the ECtHR's jurisprudence is rather clear. Recently there have been calls for a formal protocol addition recognizing individual procedu-

[310] Hayward, p. 144.

[311] These two North American countries were not involved in the process. Ibid., p. 57

[312] Quoted from the European Commission website at http://ec.europa.eu/environment/aarhus/ Last Accessed [27 May 2010]

ral rights to environmental protection in the European Court, essentially to bring it formally inline with the Aarhus Convention protections,[313] because questions have been raised as to whether the European Community regulations implementing the Aarhus Convention are strong enough to give proper effect to the goals of the treaty.[314] The details of this discussion will certainly impact the EHR discourse as it moves forward, but for now the existence of the discussion can be taken simply as another illustration of the way European regulations reinforce, shape, and extend others in related national, international, and supra-national levels.

And the Convention has indeed had a direct impact on the jurisprudence of the ECtHR.[315] The Aarhus Convention spurred the French government to provide public access to data on point source emissions.[316] The new (2003) European Polluting Emissions Register, however, is quite a few years behind the American Toxic Release Inventory[317], which came into being in 1988.[318] The push toward more common provision of information is certainly a benefit for environmental concerns. Thus, as discussions move forward, the Aarhus Convention can, for the purpose of the ECHR focus herein, be viewed as codifying existing "procedural and remedial guarantees"[319] and bringing awareness of such guarantees to the individual, while not requiring national authorities

[313] Recommendation 1614 of Parliamentary Assembly 27 June 2003, cf. San José, p. 5,n. 1

[314] Specifically, Regulation 1367/2000 is potentially flawed in that it does not allow individual participation to decision making at the Community level. This is only a potential, however, and should be discussed further in light of the procedural guarantees it does give to the individual, notably the power to request internal reviews be conducted. See, for a further and more in depth discussion, Wennerås, Pål Erik *EC Environemental Law in National and Community Courts*. Ph. D thesis, Universiteit van Amsterdam, 2006, p. 242

[315] Boyle *Fordham Envtl. L. Rev 18 [2007]*, p. 477.

[316] French Ministry of Ecology and Sustainable Development (MEDD), Directorate on the Prevention of Pollution and Risks, cf. Laurian, Lucie Environmental injustice in France. *Journal of Environmental Planning and Management*, 51 2008.

[317] The Toxic Release Inventory (TRI) is a data set compiled by the US EPA. It keeps track of the quantity and location of releases of chemicals classified as toxic. The TRI was established in 1986 by the Superfund Amendments and Reauthorization Act. The aim of the project is to provide necessary information to citizens who may need to prepare or face a toxic release. cf. Bowen, William/Wells, Michael V The Politics and Reality of Environmental Justice Research: A History and Considerations for Public Administrators and Policymakers. *Public Administration Review*, 62 2002, Nr. 6, p. 692 Notably, however, not all industries are required to report to the EPA for inclusion, and there is no data verification process, making the data set incomplete and error-prone. Further, hundreds of chemicals have been added to the list since its 1980's inception, meaning one must be careful in using its data toward measuring disproportionate distributions; see Bowen *Environmental Justice through research-based decision making*, p. 113

[318] Laurian, p. 61.

[319] Wennerås, p. 243.

to create procedures for popular action.[320]

The Aarhus regulations stop here, similar to where *Guerra* placed boundaries, for practical reasons, Member States in the EU, constituting a large section of the Aarhus signatory countries, have different traditions regarding access to justice. Vera et al.[321] note that some allow *actio popularis* and others have more limited options. Implementing a popular action procedure across the national jurisdictions would have serious ramifications on the number and type of cases brought for consideration. Boyle then connects the Aarhus Convention and ECHR logic, stating "[i]f Aarhus can therefore be viewed as promoting public interest participation, the ECHR case law remains firmly grounded in individual rights."[322] The interaction of the ECHR, the European Court of Justice, and the Aarhus Convention, as well as the potential for a complete incorporation of its ideals, carries potential energy toward forward motion in codifing environmental rights.[323] But for now, the Aarhus Convention, like the derived rights illustrated above, only help to sketch out the consensus areas established protection. In fact, now that these areas have been acknowledge, some, such as the U.K., worry about their expansion and take steps aimed at circumscribing responsibility.[324] Notably, the UK apparently did not believe their declaration was a reservation at all, failing to characterize it as such in their ratification,[325] but seen in the light of expanding positive environmental obligations it is hard to see it as anything less than

[320]Vera, Esther Pozo/Masson, Nathy-Rass/Krämer, Ludwig *Milieu-Environmental Law and Policy*. European Union Environment Directorate General, September 2007 (Study Contract 07-010401/2006/450607/MAR/A1). – Technical report

[321]Ibid.

[322]Boyle *Fordham Envtl. L. Rev 18 [2007]*, p. 497

[323]It not only has the potential to change national law, but also the possibility to change directions of research. For instance, Laurian (2008) notes that her research (in 2007) would not have been entirely possible prior to the Aarhus Convention's mandates on information access.

[324]Provisions like those added by the UK to the body of the declaration (*See* Aarhus Convention Declarations) tacitly acknowledge that the treaty could lend momentum toward an environment and take steps to limit the degree this is possible.

> "The United Kingdom understands the references in article 1 and the seventh preambular paragraph of this Convention to the 'right' of every person 'to live in an environment adequate to his or her health and well-being' to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention."

[325]Kravchenko/Bonnie, p. 5.

a clarifications of the boundaries of obligations.

Besides derogations by signatory countries, the most lacking aspect of the Aarhus Convention relative to securing out environmental duties is a clear standing for individuals to enforce any rights derived from the treaty. Despite its clear emphasis on activism, NGO's, and goals-based language focused on guaranteeing participation at planning stages—which commentators have noted lend much potential strength for public environmental protection[326]—the Convention ultimately lacks the means for citizens to directly enforce a right through national law.[327] E.U. legislation implementing the Aarhus Convention however does now extend to individuals the opportunity for enforcement, though only in E.U. countries and not the entire contingent of ECHR signatory countries.

Although the right to information stemming from instruments inherent in the ECHR is more restricted than what is proposed in the Aarhus Convention, it may prove easier to access the right through the established mechanics of the European Court. If the two instruments reinforce each other, then there is no problem. Boyle states, for example, with regard to the recent *Taskin* decision that "the broader public interest approach of the Aarhus Convention and the narrower ECHR focus on the rights of affected individuals are "very evident" in the jurisprudence surrounding both.[328] If they continue clarify these areas of focus, they will not only reinforce each other but stand to clearly map out areas of environmental protection. If they and the jurisprudence inspired by cases brought to each however do so only clumsily, there is a chance for holes in intended protection. The need for clarification both of access to information and the legal proceedings guaranteeing that access is evident. Nevertheless, the Aarhus Convention is another positive step towards enunciating and codifying the minimum standards of information flow necessary for citizens in the modern world to be truly involved, and as such reinforces the momentum the European Court has taken in its own jurisprudence.

[326] Boyle *Fordham Envtl. L. Rev 18 [2007]*, p. 477.

[327] Hayward, p. 180. As is the case with other documents, such as the UN Convention on the Rights of the Child (CRC), among others. Here, in Article 24, we find a "right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health." The CRC is notable though for explicitly recognizing the linkage between health and environment, especially in the notably more sensitive world of children.

[328] Boyle *Fordham Envtl. L. Rev 18 [2007]*.

4.2.5 Rights to Process and Remedy

Difficulties in managing the aftermath of environmental pollution can also trigger Convention rights parallel to the derived rights to information or extracted forward protections to life and familial connections. Convoluted, excessively long, or ineffective legal process may call into question a States ability to provide access to justice, and thereby to rights protected by the Convention itself, raising visible issues under Article 6. Once again, ineffectual remedies are no real remedies at all. Article 6 covers the standard liberty to a fair trail, which has been expanded by the Courts jurisprudence to include a right to access the court system.[329] The basic dynamic desired is for national authorities to provide a domestic forum to dispute and define civil rights and obligations. If the requisite dynamic does not exist to the extent a plaintiff believes it should, then they can appeal to the Convention alleging that the lacuna affects the determination of their civil rights under domestic law.

In order to find recognition that access to the legal system falls short of Convention protections in environmental contexts, the relation between the civil right and the environmental problem must be quite direct.[330] As there is no defined right protecting against environmental issues this is not surprising; how does one claim that their access to justice has been abridged when there is no promise of justice with which to begin? This imposes high hurdles on the employment of Article 6 when the underlying complaint is environmental in nature. Some national constitutions clearly establish a constitutional right to a certain quality of environment, and thereby a codified direct relationship, but this is still the exception.[331] But it remains difficult to claim Article 6 infractions before an environmental problem occurs, limiting access to claims against Article 6 as ex post options. Nevertheless, the protection provided by Article 6 serves as a motivation for national authorities to have and maintain just and

[329] *Golder v. the United Kingdom*, application no. 4451/70, 21 February 1975.

[330] *Balmer-Schafroth and Others v. Switzerland*, application no. 67/1996/686/876, Grand Chamber judgment of 26 August 1997.

[331] E.g. *Zander v. Sweden*, application 14282/88, judgment of 25 November 1993. Also *Taskin v. Turkey*, application no. 46117/99, judgment of 10 November 2004. Also, the Ksentini Report noted over 60 constitutions which "contain specific provisions relating to the protection of the environment"; Ksentini, Fatma Zohra *Human Rights and the Environment.* UN Commission on Human Rights; Sub-commission on Prevention of Discrimination and Protection of Minorities, 6 July 1994 (UN Doc E/CN.4/Sub.2/1994/9). – Technical report, p. 58. See also recent discussions in Turner, 27-38; Kravchenko/Bonnie; and Boyle *Fordham Envtl. L. Rev 18 [2007]. But note* Bothe, M. (1998). *The Right to a Healthy Environment in the European Union and Comparative Constitutional Law*, in: *Développements récents du droit européen de lenvironment.* Antwerpen. p. 1-9.

effective domestic procedures, including adequate appeals processes.[332]

Beyond Article 6, Article 13 provides more flexibility in its application to environmental situations, securing remedy where violations occur.[333] Article 13 guarantees that where a possible violation of Convention rights exist, there is also an effective remedy should the applicant succeed in their argument.[334] Notably for the complainant, a violation of the claimed Convention right need not be found in order to succeed in a claim alleging a missing remedy.[335] Article 13 looks similar in its empowerment to that given to victims in situations such as those that the Aarhus Convention also tackles. Like the powers of Article 6, the rights secured under Article 13 are a motivation for a State to create and maintain a well-functioning judicial system, and, where necessary, to take up legislation that would more effectively secure the rights under the Convention. All in all, the procedural rights to fair trials and legal processes are the cement to bind the substantive rights together and cover situations where individual rights are infringed by environmental burdens.

These Article 6 and 13 rights stem from a long history of jurisprudence that overlaps with our preceding examples. The European Court has found that access to courts must include access to courts at a local enough level to serve as a reachable option for satisfaction[336] This is naturally a precondition for the functional principal of subsidiarity. The access must also have the possibility of leading to true remedies; the process cannot be illusionary or simply process oriented. State actions or laws which can effectively move around proper procedures, to the detriment of individuals, trigger protection of Article 6.[337]

---

[332] *McMichael v. the United Kingdom* application no. 16424/90 judgment of 24 February 1995.

[333] Although where an Article 6 claim, especially article 6(1), exists, or a similarly an Article 5(4) claim, the Court will not touch on Article 13 claims. Articles 5 and 6 are considered stricter and therefore are assumed to subsume any potential Article 13 issues. *See, inter alia Hentrich v. France*, application no. 13616/88, judgment of 22 September 1994; *Murray v. United Kingdom*, application no. 14310/88, judgment of 28 October 1994. *Balmer-Schafroth v. Switzerland* judgment of 26 Aug. 1997, 25 E.H.R.R. 398.

[334] *Leander v. Sweden*, application no. 9248/81, judgment of 26 March 1987, para 77.

[335] *Klass and Others v. Germany*, application no. 5029/71, judgment of 6 September 1978, para 64; *Silver and Others v. United Kingdom*, application nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, judgment of 25 March 1983, para 113. Also note *Hatton and Others v. the United Kingdom*, where a violation of Article 13 was found in spite of no violation of Article 8 being found.

[336] *Mats Jacobson v. Sweden*, application no 11/1989/171/227, judgment of 21 May 1990. Also *Hornsy v. Greece*, application no. 18357/91, judgment of 1 April 1998.

[337] *Kyrtatos v. Greece*, application no. 41666/98, judgment of 22 May 2003. Here, authorities had continued to issue building permits on a rezoned piece of land, which was found

The bar though is set above a question of whether the situation at hand breaches a true "civil right."[338] In the early case of *Powell & Rayner v. the United Kingdom*, the Court rejected the applicant's claim under Article 6 as no civil right existed in English civil law. In that case, the applicants' would have needed a right to compensation for aircraft noise. The Court saw that their issue was more directed at domestic law which limited their ability to compensation, and not at a fundamental imbalance by the State's decisions in when compensation could be paid. This is one of several cases in which the Court determined the threshold of where a civil right exists, and when it does not.[339] The absence of a "civil right" stemmed from an absence in domestic law of a right *to* compensation for noise pollution from aircraft.[340] Despite this particular outcome, the Court has expressed that it will not always limit a discussion involving civil rights by what is nominally prescribed in national legal systems between private and public law.[341]

There is a tight link though between Article 6 and 13. A problem generating a failed Article 6 claim, however, could still be valid as viewed from Article 13; an available but truncated remedy could indicate a failure on the State's part to secure sufficient Article 13 protection. In the *Powell & Rayner* case, the lack of a domestic civil right again played a part in the Court's finding of no violation of Article 13. Since Article 13's provisions are less strict than Article 6§1, if a complaint against Article 6 §1 is found lacking, a subsequent claim in the same case against Article 6 §1 will also be struck out.[342]

While the lack of underlying environmental civil rights abbreviates extraction of much environmental protection, the most important aspect of Article 6 and Article 13 protections for the positive requirements remain the power to push public participation. In making environmental decisions, not only must there be effective remedies for wrongdoing, and ability to challenge perceived

to be unconstitutionally rezoned. The access to the rezoning proceedings by the applicants had no real effect on the ability or inability to permit buildings.

[338] *Powell & Rayner v. the United Kingdom*

[339] E.g. *Mats Jacobsson v. Sweden*, and *Allan Jacobsson v. Sweden*, application no. 10842/84, judgment of 25 October 1989. finding civil rights were indeed at issue.

[340] Noting the Land Compensation Act of 1973, which did not provide compensation for loss in value from intensification of, rather than new, noise sources; also Noise Abatement Act of 1960 and Civil Aviation Act limited the liability of operators and officials.

[341] *Golder v. United Kingdom*, application no. 4451/70, judgment of 21 February 1975; compare *Ünver v. Turkey*, application no. 36209/97, judgment of 26 September 2000, limiting claims of civil rights against where the right is a procedural right under domestic law.

[342] *Inter alia Powell & Rayner v. the United Kingdom.*

wrongs, but a requirement to take into account *ex ante* the opinions of those who will be affected by government decisions.[343] Presentations by developers and those applying for environmental use permits must be accessible by the public, both to collect information relevant to them and to present their ideas and interests.[344] Like the positive obligations for access to information, the obligation for public participation does not impose a collection duty on the State. It is in the best interests of all parties to bring and debate relevant information, but there is not a requirement to bring a certain level of information to the discussion. The logical extension then allows for States to take decisions even in the absence of measurable data, or where data cannot be secured for any number of reasons, most notably technological and time limitations.

The mechanics of environmental regulation remain tilted in favour of industry, as there is no hard-and-fast backstop here for the public, but even the porous acknowledgment that hindering information is unacceptable is a small step towards empowerment. The combined forces of Article 10, 13, and 6 place these procedural and informational duties on the State. States must undertake more positive actions the more risks or dangers present for the populace for whom they are charged with securing the rights in the Convention. Further combined with the substantive rights in Article 2 and Article 8, the European Court has sketched out some significant areas where damaged environs trigger human rights-level protections. But there is one more section of the Convention which, though not yet as relevant to the environmental aspects discussed above, is quite important to the as-yet undiscussed justice side of the environmental protection.

4.2.6 Article 14: Discrimination

Unlike the discussion in the U.S., this chapter has gone quite far in discussion rights to environmental quality without invoking the concept of discrimination, or even of "disproportionate." Indeed, the ECHR focus has done much in the direction of environmental justice without invoking groups or power struggles. There is, however, protection from discrimination within the human rights document.

Article 14 of the ECHR secures the enjoyment of rights "set forth" in the

[343] Council of Europe *Manual on human rights and the environment*; *Hatton*, para 99
[344] *Hatton*, para 128

Convention "... without discrimination on any ground..." This, like the prohibitions on torture, allows for no "paragraph 2" derogations. The logic here is that human rights permit no variation across the human spectrum. This is not a right that is meant to rectify past discrimination like the U.S. anti-discrimination laws which make up so much of their environmental justice discourse, it is to secure the other human rights in the Convention across all individuals living within the jurisdiction of any state party to the Convention. Specifically, it secures the "enjoyment of the rights and freedoms... without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." The wording emphasizes right away a distinction with the Equal Protection Clause found in the U.S. Constitution.[345] As Gomien et al. note, Article 14

> Is not framed in general terms of equality before the law or equal protection of the law. Instead, it guarantees to everyone within the jurisdiction of a State Party (cf. Article 1) the enjoyment of the rights and freedoms protected by the Convention itself.[346]

This explains why Article 14 is "parasitic" in that it does not convey independent or free-standing protection. It protects *through* these other substantive rights, making sure that those rights are applied and received equally. Nevertheless, there need not be a violation of the underlying right for a violation of Article 14.[347] According to *Abdulaziz and Others v. United Kingdom*[348]

> "... Article 14 compliments the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms safeguarded by those provisions. Although the application of Article 14 does not necessarily presuppose a breach of those provisions—and to this extent it is autonomous—there can

[345] There is, however in Europe the Framework Convention for the Protection of National Minorities (FCNM), which does have parallels with the proactive U.S. approach to discrimination against minorities. See discussions in Letschert, Rianne M. *The Impact of Minority Rights Mechanisms*. T.M.C. Asser, 2005.

[346] Gomien/Harris/Zwaak, p. 345.

[347] Inter alia, *Gaygusuz v. Austria*, application no. 17371/90, judgment of 16 September 1996.

[348] application nos. 9214/80; 9473/81; 9474/81, judgment of 28 May 1985, para 71

> be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.

In that sense, Article 14 does indeed add value[349] to the protective landscape, protection that is notable for environmental justice ends.

Because of its nature, the first level of inquiry in a claim involving Article 14 is to establish the applicability of an underlying right, even if it is clear there is no violation of that underlying right. That step completed, one focuses on establishing a comparator group. Favourably for its application, the list of protected classes in Article 14 is open ended.[350] That is, the Court has not brought forward a limited number of categories to serve as comparator groups when looking for evidence of discrimination. Notably for environmental justice discussants, there is no current evidence of an acceptance income-defined classification, there is however evidence of discrimination between "ranks,"[351] trade unions,[352] types of homeowners,[353] intentional versus unintentional tort victims,[354] and large and small landowners.[355] The most general statement of the Court's view is from *Kjeldsen, Busk Madsen and Pedersen v. Denmark*,[356] defining "status" as "a personal characteristic by which persons or groups of persons are distinguishable from each other." Though there is no evidence for recognition of income-segmentation then does not mean this is not a path then toward leveling the tilted playing field.

The extent to which one can define "classes" for comparisons is speculative, but introduces the substantive topic of comparators. Once the court or the jurisprudence has accepted the ability to draw lines on some metric—race, gender, rank, status, or income—it is up to the applicant to establish their similarity to that comparator group.[357] It is not up to the State to explain

[349] Janis/Kay/Bradley, p. 463.
[350] Ibid., p. 470.
[351] *Engel and others v. Netherlands*, application nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, judgment of 8 June 1976
[352] *National Union of Belgian Police v. Belgium*, application no. 4464/70, judgement of 27 October 1975.
[353] *Spadea and Scalebrino v. Italy*, application no. 12868/87, judgment of 28 September 1995.
[354] *Stubbings v. United Kingdoom*, application no. 22083/93, judgment of 22 October 1996.
[355] *Chassagnou and others v. France*, application nos. 25088/94, 28331/95, 28443/95, judgment of 29 April 1999.
[356] application nos. 5095/71, 5920/72, 5926/72, judgment of 7 December 1976, para 56.
[357] *Fredin v. Sweden* (No. 1), application no. 12033/86, judgment of 18 February 1991. . *van der Mussele v. Belgium*, application no. 8919/80, judgment of 23 November 1983.

"why you and not them." Rather, it is up to the respondent first to establish that there is much similarity between "me" and "them;" one cannot prevail on a claim that you have been treated differently until you prove that you are the same.[358] Establishing similarity then—counterintuitively—is the first hurdle in showing discrimination. Inquiry can then proceed to the facts which either justify or fail to justify the differential treatment among sufficiently similarly situated entities. This does not, however, mean that the groupings must be similar in all aspects. That is, one does not have to find a grouping that is only different on the characteristic—race, income, status etc.—on which one is claiming discrimination. "[T]he fact that there are some differences between two or more individuals does not preclude them from being in sufficiently comparable positions and from having sufficiently comparable interests."[359] In the *Paulik* case, the Court stated that the groups at issue, while not identical, were analogous positions with respect to Article 14 and their interests in the utilization of the right.

Once an applicable comparator is established, inquiry proceeds. In the main, where there is no blatant or conspicuous discrimination, a weighing of the margins of appreciation commences. States enjoy space to decide which situations they deem fit for differential treatment,[360] which is indeed what "discrimination" is, but that margin contracts according to the subject matter. Similar to the case-law in the U.S. on discrimination, and following the precedents in interpreting other substantive rights in the ECHR, there is an inherent hierarchy of situations which shrink margins of appreciation; deciding how and if to expose citizens to bodily dangerous or potentially risky situations is narrow,[361] whereas the realms of morals or other subjective cultural choices enjoy wider margins. When it comes to differential treatment on the terms of race and gender, the margin narrows considerably. Beyond the measuring, the European Court will weigh whether the justification presented is accomplished by means which justify the ends.[362]

There is suggestion, though, that Article 14 is aimed more at direct dis-

[358] This paradox of discrimination cases was pointed out to me by Professor Richard Kay.
[359] *Paulik v. Slovakia* judgement of 27 July 2004.
[360] *Abdulaziz v. United Kingdom*, application no. 9214/80, judgment of 28 May 1985, para 78.
[361] Janis/Kay/Bradley, p. 242-53.
[362] *Sidbaris & Džlautas v. Lithuania*, applications nos. 55480/00 and 59330/00 judgment of 27 July 2004.

crimination than indirect discrimination.[363] The more recent case of *DH and Others v. Czech Republic*[364] seemed to speak in that direction, where the Court overlooks the enablement of discrimination that a domestic policy creates. The significant debate which the Second Section of the Court created[365] and the eventual finding by the Grand Chamber of an Article 14 violation (in conjunction with Article 2 of Protocol 1)[366] seems though to speak toward a larger and growing European momentum in a broader anti-discrimination direction.

In the venerable *Belgian Linguistic Case*[367] the Court establishes that equal protection applies to both negative and positive obligations arising from the existing rights.

> "No distinctions should be made in this respect according to the nature of these rights and freedoms and of their correlative obligations, and for instance as to whether the respect due to the right concerned implies positive action or mere abstention."[368]

Following this logic, States cannot avoid a charge of discrimination in one area by being more liberal or accommodating in other areas. Anti-discrimination is a laudable and integral component of the ECHR and despite its lack of autonomous standing in Article 14 the principles it injects into the Convention pervade all areas.[369] This elevates the goals of non-discriminatory application of rights, being "laudable and integral," and becomes another component of the inertia in the ECHR's forward-looking protection. Nevertheless, the differential treatment *can* be found to be justified and hence left alone by the European Court.[370]

To summarize then, discrimination for the European Court follows the logic set out in the *Belgian Linguistics* case, and thus can occur when 1) the facts

[363] *Abdulaziz v. United Kingdom*, application no. 9214/80, judgment of 28 May 1985.
[364] judgement of 6 February 2006
[365] Janis/Kay/Bradley, p. 493.
[366] Application no. 57325/00, judgment of 13 November 2007.
[367] Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium", application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/6423, judgment of 23 July 1968.
[368] para 9. On positive obligations specifically, see *Botta v. Italy*, application no. 21439/93, judgment of 24 February 1998, para 33.
[369] Notably, but not discussed at length here, is Protocol 12 to the Convention. Like Article 14, Protocol 12 is aimed at preventing discrimination. Unlike Article 14, it is freestanding.
[370] *Frettté v. France* judgment of February 26, 2002; challenging a refusal on gay adoption.

of the case disclose a differential treatment 2) the distinction does not have an aim, that is, it has no objective and reasonable justification having regard to the aim and effects of the measure under consideration 3) there is no reasonable proportionality between the means employed and the aim sought to be realized.[371] Notably, the European Court has been more permissive than the historically-minded US Court in finding certain instances of discrimination "justified."[372] And so it is

> "the inequality of particular treatment that is at issue under Article 14, not the comparison of different options a State chooses among when restricting the exercise of a given substantive right."[373]

Under the guidance of *Belgian Linguistics*, the disproportionate impact (differential treatment) triggers scrutiny. The State then can show that the difference has an aim, and finally then show that the aim has a reasonable justification commensurate with the means used to achieve it.[374]

Although the the protections from discrimination in the US and Europe share this similarity, the anti-discrimination protection in the ECHR is not a large point for the environmental justice debate. Though the connection that the protection a substantive EHR could provide against injustice is known, there is little cross-over to discussing discrimination provisions in the ECHR. To illustrate, the U.S. jurisprudence on discrimination covers prominently both sex and race discrimination, the European Court literature however weighs more heavily on sex issues, predominately where national provisions are ap-

[371] Gomien/Harris/Zwaak, p. 350.

[372] Janis/Kay/Bradley, p. 503; see expanded discussion in Chapter 5

[373] Gomien, p. 146.

[374] More guidance can be found in the The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature Dec. 21, 1965, art 1, 5 I.L.M. 350 (entered into force Jan 4, 1969). The ICERD is a United Nations document aimed at doing just what its title states. As such, it clarifies and gives weight to the earlier UDHR. Article 14 of the ECHR is the working equivalent within Europe. The ICERD notably goes beyond the US's focus on intentional discrimination, and moves toward the positive obligations of States to secure fundamental rights Gast, p. 272. Like the ICESCR, it is a positive focused instrument. As with the European Convention though, it does not directly grant environmental rights in reaction to racism, but environmental issues are noted by the committee overseeing implementation of the goals. See also Dommen, Caroline Claiming Environmental Rights: Some Possibilities Offered by the United Nations' Human Rights Mechanisms. *Georgetown International Environmental Law Review*, 11 1998. Secondly note ICCPR Art. 20 and 27. Finally note margins of appreciation are not unlimited. See *Chassagnou and others v. France*, application nos. 25088/94, 28331/95, 28443/95, judgment of 29 April 1999. .

plied differently across men and women with rather anachronistic justifications.[375] Commentators have noted the lack of mentions of overt racism in European environmental justice literature, along the lines of the ECHR logic, although there is a focus on national minorities and aliens.

That is not to say racism or even similar components to racial histories are not shared across the Atlantic. Although lacking the history of slavery, as colonial powers like France did not allow slavery on the European continent, there is a legacy of intra-colony slavery with which to contend.[376] There are too some of the same racial history which permeates the U.S. civil rights saga of the late 20th century, stories which lend strongly to the legal landscape of Civil Rights discussed in Chapter 5. For instance, in the 1950s and 1960s, it was legal for European pub owners to deny a drink to non-whites, racial insults at work were legal, employment discrimination was legal, as were advertisements for apartment rentals for whites only, strongly paralleling the U.S.'s separate but equal philosophy.[377] The 1980s saw a reversal of this trend and an overarching acceptance by the European Union that problems exist and need to be rectified.[378] The similar experiences do tend today to manifest themselves in different ways in different locations, a fact which shows above all that racism is not a universal language.[379] Aliens and immigration though occupy the historically relevant issue today in Europe over the scars of the slave trade which generate the focus on race in the U.S.[380] Several articles mention immigra-

[375]See *Abdulaziz, Cabales, and Balkandali v. the United Kingdom* application no. 9214/80; 9473/81; 9474/81, judgment of 28 May 1985, regarding differential immigration treatment of employed women who wish to bring their husbands in to the country and the inverse situation; or *Wessels-Bergervot v. the Netherlands* application no 34462/97 judgment of 4 June 2002.

[376]Bleich, Erik Antiracism without Races. Politics and Policy in a "Color-Blind" State. *French Politics, Culture and Society*, 18 2000, Nr. 3, p. 54.

[377]Idem *Race Politics in Britain and France: Ideas and Policymaking since the 1960s.* Cambridge: Cambridge University Press, 2003, p. 196.

[378]Interestingly European States have differed with themselves and with the U.S. how to address discrimination left over from a racial past. For instance, Britain and France have taken quite different approaches to the integration of migrant populations. Great Britain moved during the post-WWII period toward using civil law to penalize access racism—the type of racism which prevents minorities from accessing services similarly accessed by non-minorities. France, on the other hand, used criminal law. See Geddes, Andrew/Guiraudon, Virginie Britain, France, and EU Anti-discrimination Policy: The Emergence of an EU Policy Paradigm. *West European Politics*, 27 2004. Work by Bleich illustrates quite well the very different approached taken by two large EU countries in combating racism, and concludes that neither is unambiguously more successful than the other. Bleich *Race Politics in Britain and France: Ideas and Policymaking since the 1960s*, p. 203.

[379]Martinez-Alier, Joan *The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation.* Edward Elgar, 2002, p. 172-73.

[380]As an example of this difference, see Article 16 ECHR, which allows for derogation

tion and aliens but are the only places however where we find even minimally extra protection or rules for minority groups within Europe. Otherwise, the Convention is a one-stop document protecting all persons within the jurisdiction of the High Contracting Parties.[381] The different historical backgrounds of minorities in Europe translates into a different discursive focus than the U.S., and leaves Article 14 little mentioned in discussions of EHRs in Europe. The lacking should not be interpreted as a vote against its eventual usability, especially toward environmental justice ends.

4.3 Conclusions for EHR and the ECHR

The preceding sections covered a lot of ground in relatively large leaps. That may feel doubly so for a reader new to the European Court or formal human rights instruments. As the goal is to paint as complete a picture of the protection the European Convention already offers in the way of environmental benefits, and, by inference, what EHRs in general could accomplish, a summary exercise is in order bringing that protection in to focus. What ultimately must be answered is to what degree this protection affects the concerns of environmental justice. It should be clear though that some degree of protection indeed exists. The goals of the UDHR and the ECHR have been brought to some degree of fruition in the jurisprudence of the ECtHR. This section aims to bring all the jurisprudence of the ECHR discussed above into such focus as to, first, clearly and concisely delimitate what derived or extracted environmental protections exist,[382] and second, to what extent those protections address, or could be reasonably expected to address, the environmental justice issues developed in Chapters 2-3.[383]

There are two lines of thought here that one must be careful to not entangle. This chapter addresses how well the derived rights to environmental protection illustrated above succeed in addressing environmental justice concerns.

of the rights of aliens to engage in political activities. "Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens." (Article 16). Notably, this Article's statements have no counterpart in other prominent human rights conventions. Gomien/Harris/Zwaak, p. 357 Other amendments to the Convention mention aliens in their capacity to be, or not to be, expelled from a territory. Articles 2, 3 and 4 of Protocol 4 and Article 1 of Protocol 7.

[381] Also note Council Directive 2000/43/EC which is based on Article 13 of the Amsterdam Treaty Geddes/Guiraudon, p. 334"

[382] Section 4.3.1

[383] Section 4.3.2

That is, given the demonstrated but extracted (un-codified) protections of the ECHR on environmental issues, does the protection address the agglomeration of pollution among a minority of the population or their relative powerlessness to affect choices which turn that cycle towards them? If the reader agrees with the preceding chapters deriving the problem, and acknowledges the interpretation of ECtHR cases proffered, the conclusion emerges that environmental justice protection does exist via derived EHR protections. It is, however, incomplete protection, just as the derived EHR protection is incomplete relative to what proponents of adopting a formal EHR might want.[384] The outcome is unsurprising as it was never tuned toward such ends.

Parallel to this inquiry and conclusion, however, there is the related question of how well a recognition of the role justice, or equality, concerns which play in environmental matters could feed back to clarifying environmental protections via human rights. Given the successful expansion of the jurisprudence of the ECtHR toward environmental ends, but overall reluctance to solidify those traced and foggy boundaries, does the comparative (positional) nature of environmental justice inquiry add towards firming up those boundaries? After all, it is the unclear boundaries of EHR which creates much of the concern towards adopting them. Part of this question is touched upon in a later chapter, in illustrating how the ECHR's approach informs the less successful U.S. approach to melding rights and environmental concerns. But this question should be addressed more directly in later research. In the meantime, there is plenty to address as to the overlap between derived environmental rights and environmental justice concerns.

4.3.1 The Existing Coverage of EHR in Europe

Cases in the European Court which connect environmental conditions to human rights protections show, first and foremost, a recognition that environmental concerns can indeed affect human rights obligations already entered in to by signatory states. This in itself might be shocking for lawyers from different backgrounds, as might be the absolute breadth of rights across which protections are derived. This is an important reminder of the "living document" philosophy of the European Convention, as it is unlikely given the

[384] See discussions in Shelton, Dinah Human Rights, Environmental Rights, and the Right to Environment. *Stanford Journal of International Law*, 28 1991; Also Hayward.

antebellum milieu surrounding its early days, that many duty-holders saw the importance this nexus would become in just fifty short years.[385] The evolution and expansion of the protections embody the momentum given by the framers, pushing fundamental rights ever farther up the moral ladder, protections unnecessary when earlier framers bound the hands of the State in classic libertarian rights.

Perhaps given the devastation to civilian areas during the War, someone might have made the prescient connection between humans and their immediate environs, seeing devastation or damage to sustaining areas as impacting a human's right to life. What practical substance does a right to life have if the life-supporting environment does not exist? And while this is the heart and soul of the argument for a fundamental human right *to* the environment, the European Court and its forward momentum has moved more slowly and cautiously in that uncharted direction, recognizing rather than defining.

The caution though has nevertheless outlined significant territory. The failure of the state to protect that connection in times when it was in their power to foresee calamity came to a modern head in *Öneryilidiz v. Turkey*.[386] While neither modern legal writers or scientists may not yet be able to define what a "safe" environment is, the European Court can tell what a "dangerous" one is, at least relative to the obligations states already have. This black-letter case also shows the human rights community that administrative failures toward remedy are not small bureaucratic problems but carry human rights implications. The take-away message seems to be that signatory states have been put on clear notice that human rights are more than goals; fundamental rights are not only clearly definable with respect to connections tangential to factors of life—such as the environment— but the factors that do carry fundamental protections must engender real, and demonstrably practicable, answers.

Of course, not all cases with environmental overtones carry the weight of *Öneryildiz*. Recognizing that human rights can reach into areas of life when dangers are clear and present is another weapon in Davey's aresenal—to paraphrase Luke Cole[387]—against the Goliath sovereign, but there is much room

[385] Ovey/White, p. 40, noting the utilization of preparatory work in Convention interpretation by the European Court. A comparison here between the "originalist" philosophy of Constitutional interpretation in the U.S., especially at the Supreme Court level, is inevitable and merits closer scrutiny in later research linking European human rights and the traditional U.S. environmental justice discourse.

[386] Section 4.2.2.1.

[387] Cole, Luke W. Environmental Justice Litigation: Another Stone in David's Sling. *Ford-*

between the danger of death by industrial explosion and the nearly omnipresent lurking dangers of modern living. But here too the European Court has set plodded forward and given tools to help evaluate whether a State has satisfactorily met their commitments to human rights.

Using *Hatton and Others v. United Kingdom* as a visual, one sees a commitment to allowing State's flexibility how to use their national environments. That flexibility extends to both how to use the environment and how the State goes about deciding how to use it. Thus there are no substantive nor procedural prescriptions. *Öneryildiz* and the ECHR does not keep modern states from any engaging in dangerous activities, or even activities that pose little traceable danger to life. It does, however, force a State to make sure to actively consider the dangers they are placing on citizens. It does not tell how to go about actively considering dangers though. *Hatton* and its predecessors brings the concept of the margins of appreciation, a flexible approach to analyzing the state's burden as a duty holder. The environment might not currently endanger one's life, but it can impact deeply the enjoyment of that life, deeply enough to trigger protection. States can still decide to encroachment into private life. They have to go about such activities with deliberative and careful purpose, however, minimizing what they can and providing opportunities to put a check on those choices, recognizing that their incentives may not be aligned with those of the impacted citizen.

There is a sense of emphasis on proactivity here, and that the Court will not accept ignorance of the connections between environmental issues and fundamental rights, even in situations, like *Hatton*, where physical dangers are low and environmental inquiry borders on defining substantive levels of allowable environmental burdens. Although the margins of appreciation move power toward the State, allowing them much leeway in justifying modern environmental burdens, the ruling not only positively accepts that a degree of environmental protection extends from Article 8—a broader area of obligations than Article 2—but also that the state must devise substantive methods for protecting the familial and home connections when modern life encroaches, *and* must also have procedural methods in place to handle questions that come up from that encroachment. As Boyle summarizes, using the recent *Taskin* case as a clarifying example[388]

ham Urban Law Journal, 21 1994.

[388] application no. 46117/99, judgment of 10 November 2004.

> "[i]f *Hatton* shows a reluctance on the part of the Court to grapple with the merits of a decision interfering with individual rights, *Taskin* convincingly demonstrates an unequivocal willingness to address the proper procedures for taking decisions relating to the environment in human rights terms."[389]

The rulings make sure that the singular voices do not get lost in the din of modern industrial life, while only stopping short of prescribing methods to the domestic authority.

And although Turkey is one of the few states to have some substantive acknowledgement of a quality environment in their constitution,[390] the problems which pushed this situation into the European Court's purview stem from the actions of the government *after* the administrative courts had struck down permits. That is, it was not the potential question of an acknowledged civil right to environmental quality that moved the proceedings. Although the administrative courts had effectively ordered the shut down of the industrial mining the Prime Minister directly intervened and helped bring a new report of environmental safety from a scientific advisory board showing a "clean bill of health" for the mine.[391] With the report in hand, the Ministry of the Environment who originally held back the permit proceeded to issue a permit and allowed mining to recommence. The government's prodding came not only from the new impact survey but also in the form of political opinion that the mine was important for economic reasons.[392]

Executive influence such as this and fundamental rights do not mesh well, and circumvention of procedure amounted to a detour around a final judicial decision, an outcome incompatible with the rule of law.[393] The administrative court agreed, holding that the earlier decision was an enforceable decision, as well as noting the accumulation of these specific chemicals in the ground could endanger future generation's rights to a healthy environment. The latter point touched on the domestic civil rights dimension.[394] But again, the Prime Minister directly intervened and prompted the Supreme Administrative Court

[389]Boyle *Fordham Envtl. L. Rev 18 [2007]*, p. 499.
[390]Ibid., p. 479-481; noting other Constitutions.
[391]paras 43-44.
[392]para 47, and 75.
[393]para. 48. Note also questions of independence raised in *Bryan v. the United Kingdom*, application no. 44/1994/491/573, judgment of 25 October 1995.
[394]para 48

to decide that the report allowing the operation to commence was not open to appeal.[395]

Further appeals to domestic courts were pending and awaiting decisions as the case was brought to the European Court alleging violations of Article 2, Article 6 §1 (right to fair trial), Article 8, and Article 13. The allegations of a breach of Articles 2 and 8 stem from the permitting of the mine, while the allegations against Art. 6 §1 and 13 stem from the convoluted pathway and appeals dynamic which ensued between applicants, the Administrative Courts, and the National and Local authorities. The *Taskin* case therefore hits all of the major pathways of moving from human rights guarantees to addressing environmental degradation. The approach of the Court to the *Taskin* case then cemented its own progress in linking modern environmental regulation responsibilities with existing human rights, focusing on proper domestic procedures and safeguards while allowing for domestic choices. The decision continues the momentum for procedural fitness to ensure the margins still afforded to signatory states is properly checked.

Backing this up is the decision illustrated in *López Ostra*,[396] which goes above recognizing home/environment connections and signals a willingness to weigh, on a case-by-case basis, the margins of appreciation due to the state. Given the particulars of the situation, how much leeway does the State enjoy before touching on a human rights violation? Danger clearly shrinks that allowance, but that is only one dimension along which human rights obligations reside. Others include what could be broadly grouped as "annoyances" to home and happiness. Also, in general "the showing of a consistent policy of regulation or abstention from regulation in other European states will influence the Court's determination of the breadth of the margin of appreciation."[397] But between *Fadeyeva* and *Öneryildiz*, the Court has shown the most willingness to discuss danger directly. *Fadeyeva*[398] shows even more clearly what lengths the Court will go through to analyze margins of appreciation.

It also tangibly extended the reach of derived protections by pushing down any requirements to causally link burdens with health outcomes; it is the connection of civil rights with environmental problems that is key. Whether that civil right is to procedural transparence or an environment in line with a na-

[395] para 49.
[396] application no. 16798/90, judgment of 9 December 1994.
[397] Janis/Kay/Bradley, p. 243.
[398] application no. 55723/00, judgment of 9 June 2005.

tional regulator's own code, the civil right has protection from the ECHR's provisions. While a positive sign as to the existence of derived environmental protection, the rulings show, by extension, that there is an un-willingeness to draw bright lines or protocols as to where obligations are met under different circumstances. Case-by-case analysis is the rule of the land for now. Like a flashlight in the dark, an exploration of jurisprudence on margins of appreciation illuminates many examples of existing rights carrying ramifications for environmental protections, but only shows pieces of the whole picture.[399]

Lest the reader take that metaphor too far, and begin thinking that derived environmental rights are bringing more judicial heat than light (perhaps physically via the friction of a growing acceptance of such cases) *Fadeyeva* also reminds advocates that tenuous and remote consequences are not acceptable links to existing civil rights. Here then is the reason why situations where danger plays a tacit role find their way into the literature more often. Backing up one's claim of problems fomented by failings of the State with science and data is implored,[400] especially where there is not a deviation from existing regulation. Dangerous environs must breach a certain threshold; what that threshold is, though, is not exactly defined. Modern city living does not constitute a *de facto* problem, but neither is the bar set so high as to require direct links between pollution and a negative health outcome like cancer or death.

It remains to be seen in what circumstance the Court will wade into human rights cases where substantive environmental quality has not already been sufficiently assessed by domestic courts. While the doctrine of domestic exhaustion usually applies the fact that environmental protections are being derived from existing rights means there might not be a domestic environmental judgment before the extant rights' breach moves to the ECtHR. Tenuous connections we know are not tolerated but there is little guidance on what differentiates cases in grey ares. Once a domestic "quality" has been breached though fundamental rights concerns begin weighing on the situation. They weigh even more heavily when no domestic remedies exist to rectify the problem. *Guerra* allows concerns to elevate above national courts without domestic exhaustion when existing remedies would not be effective, putting domestic legislatures in

[399] A good first step for future research building off of this thesis, however, could start here.

[400] *Fägerskiöld*, para. 128.

a proactive stance to watch the ECtHR and its jurisprudence. *Guerra* though at the same time alleviates some burden of information collection relative to environmental problems, an obligation read into Article 10. The State need not be assessing every usage of the environment. True, States are beholden to disseminate necessary information which they hold but that necessary component adjusts with the margins of appreciation. Further, dissemination is not the same as collection. An element of impending danger shrinks the margins within which the State can shirk in their information collection role, and the Aarhus Convention[401] sets some degree of backstop, but there is a definite limiting of paths toward substantive EHR.

Jurisprudence surrounding Articles 6 and 13—rights to utilize the courts and receive remedy from them—goes some way around Article 10's substantive limitations with open procedural pathways. Again, remedies need to be effectual, but only insofar as a civil right already exists which requires effective remedies when broken. Support at the fundamental rights level for such basic tools as public participation in processes though is almost certainly some desirable facet of EHR power. To what extent those powers are currently derived is less clear. The picture will continue to evolve, however, and rather rapidly, with the recent adherence to the Aarhus Convention and as complaints and questions are settled.

These collected rights to forward protection of life, home and familial connections, surrounded by procedural safeguards of information dissemination and access to courts and public proceedings are then bookended by Article 14's prohibitions on discrimination. Although it has no independent existence, it does offer the EHR-discourse an open-ended list of potential groups across which one can compare the application of laws. The State can still stand to justify differential treatment between accepted comparator groups, but the margins they are afforded shrink based on the subject matter; gender and national identity play the larger groupings of concern compared to the U.S.'s focus on race.[402] Differential impact triggers the scrutiny. In any situation though, the European Court views no difference in the obligations of equal application for positive or negative rights provision. These protections, however, have yet to be tested relative to the preceding Articles' rights, unlike the way that environmental justice tested the nexus of discrimination and civil

[401] Section 4.2.4.2.
[402] See Section 5.2.1.

rights in the U.S.

But unlike the roadblocks seen in the U.S., the derivations in the ECHR are being reinforced by the most recent cases, thus supporting not only the view that derived EHRs exist in ECtHR jurisprudence, but momentum is taking the Court forward, distinguishing case law even if not expanding scope. Given that the Council of Europe itself publishes a manual on how the human rights system protects people's environment, this is not a contentious conclusion.[403] The *Taskin* case finds the European Court reinforcing their own precedents, especially of relying heavily on the decisions and discussions in the domestic systems.[404] The Turkish government found no recourse in appealing to intrinsic safety. It failed to to convince the Court that, despite perhaps failing in their duties to shut the mine down, the risk derived was low and could only manifest itself over coming decades. The Government saw this as a lack of imminent risk and therefore not possible to conflict with articles of the Convention. Turkish domestic law though does guarantee protection from environmental damage. Hence, in the eyes of the Convention, the applicants' contention did touch on a serious and genuine dispute: were the procedures in place enough to give effect to this civil right? These facts led to a unanimous decision of a violation of Art. 6 §1 and Article 8;[405] the decision by the domestic Supreme Administrative Court was final, and should have been effective and binding. Without the procedural protections of law and remedy, the State's failure to regulate an environmentally-damaging industry had intruded into established, though non-environmental, human rights areas.

The view from *Taskin* summarizes as well as informs the future use of the

[403] See Council of Europe *Manual on human rights and the environment*.

[404] In particular, the Government made an arguable case that the mine had not operated in a risky manner and the tests resulting from the provisional operation of the in showed healthy environmental statistics. (para 108, 109). The domestic courts had, however, already found to their judgement that the particular aspects of this undertaking were not consistent with the right to a healthy environment (para. 112). See also *Moreno Gómez v. Spain* (para 59); finding noise bylaws had already been broken, bylaws established by the municipality, and therefore there could be no "reversal of the burden of proof" to have applicant prove levels of (noise) pollution inside their own home.

[405] But compare *Gorriaz Lizarraga and Others v. Spain*, application no. 62543/00, judgment of 10 November 2004. With regard to the complaints against Articles 2 and 13, the Court saw no need to examine the merits independently of the unanimous decisions against the State on failure to secure Articles 8 and 6 §1 rights. That the Court did not discuss these provisions directly, however, is not to say that the Court's decision did not have much to do with the two. Indeed, the process which the Court took through Articles 8 and 6§1 highlights the overlapping of protections of the Convention, especially when used as an instrument for environmental rights.

European Court as an instrument for environmental protection. And although there is a reluctance of the Court to engage itself in active weighing of merits seen in cases like *Hatton*, *Taskin* and the general consensus finds a willingness to question sufficient procedure, and even some vague notions of substance, in environmental decisions impacting on human rights.[406] Boyle summarizes that

> " [o]n this evidence the European Convention on Human Rights is note merely a living instrument but an exceptionally vibrant one, with a very extensive evolutionary character."[407]

Whether or not the protections illustrated constitute an EHR is a separate question taken up by other authors;[408] that the European Court has accepted a nexus of protection between existing rights and the way that State's use their environments in modern society is unquestionable.

And so there is agreement in an ability to protect the environment—indirectly or *par ricochet*—with the European Court.[409] And it comes at the conjunction of substantive and procedural protections to freedom writ large. One might expect as much, given the tradition within which this research finds itself. As Sen notes,

> "[i]f our concern is with equality of freedom, it is no more adequate to ask for equality of its *means* than it is to seek equality of *results*. Freedom relates to both, but does not coincide with either."[410]

The future of that protection depends on just where the Court will draw its boundaries for considering Convention rights predicated on environmental problems. The future direction though is not the research question at hand.[411]

[406] Boyle *Fordham Envtl. L. Rev 18 [2007]*.
[407] Ibid.
[408] Inter alia DeMerieux
[409] San José, p. 66.
[410] Sen, Amartya *Inequality Reexamined*. Harvard University Press, 2004, p. 87 (emphasis in original)
[411] For some ideas, however, San José calls for development in two dimensions of the Court's jurisprudence:

> . . . horizontally, by considering other rights in the Convention as susceptible to being associated with an environmental harm (e.g., the right to physical integrity (Article 3) or the right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No. 1); and also vertically, that is, assuming that those rights which the European Court has confirmed could be the object of interference as a consequence of environmental pollution, and that there may be a

The excursion into EHR was to see what kind of power it currently wields and if that power is enough to deal with the problems identified as falling under a heading of environmental justice. The success and positive overall tone of the jurisprudence connecting individual freedoms and the environment under the European Court stands in stark contrast to the dead-end seen in the US's connection of civil rights and environmental burdens. While the two situations are not directly comparable, there are similarities worthy of further discussion as we move toward policy considerations. This discussion is taken up in Chapter 5. And with the map provided by the preceding sections analysis can proceed to point out the successes and failures of human rights approaches to environmental justice. Naturally there is much more detail to be had in the legal discussion on environmental protections in the European Court's jurisprudence, but this work must continue on with this short-but-sufficient summary to examine how the uncontentious derived protections fare in protecting against environmental injustice.

4.3.2 Existing Coverage as Applied to Environmental Justice Problems

The rather laudatory phrases and pictures painted above stem from either the literature advocating continued pushes toward environmental protection via high placed rights or from general theorists who have an interest in human rights and their evolution. How though does this impact environmental justice as it was introduced in Chapters 2-3? Environmental justice admittedly remains an amorphous concept itself but can broadly be broken up into categories of concern drawn from examples lent by the literature. This concluding section compares what has been learned about derived environmental rights to those categories to see at what level environmental justice protections would also exist in the current landscape.

The first and most prominent concern raised by environmental justice is that of democratic disenfranchisement.[412] If the perceptions of the environmental justice movement are indeed prevalent, and Chapter 3 shows that one cannot rule out that conclusion *a priori*, then environmental burdens stand a good

violation not only when the core of the right is affected but also in its normal and broader context.San José, p. 68-69

[412]Section 2.1

chance of impacting a numerical minority of the population disproportionately more than the majority. This conclusion proceeds from a combination of established economic theory with the arguably uncontentious proposition that environmental burdens which were to impact (negatively) the entire majority would not—or at least would rarely—come to fruition in a democratic society. With the environmental load tilted toward a predicted numerical minority there is a risk that they will not be able to change their lot without special protections or attention and hence suffer at the hands of the majority in the same fashion against which fundamental rights were meant to protect. Human rights certainly provide that protection and deserve discussion as to their role in protecting the minority from bearing environmental burdens chosen by the majority.[413]

Secondly, Chapter 2 addressed the limited extent to which concerns about environmental impacts on health could initiate motion toward addressing those environmental problems. That is, as the environment is not a completely abstract entity and does have direct bearing on human existence, could appealing to that connection with established protections for humans and human health be enough to overcome, among other weaknesses, the democratic failing? The devastating effects environmental pollution has on an individual's health have often been used as motivation for court cases and changing public perceptions of the industrial usages to which they acquiesce. Moral indignity and outrage were, after all, catalysts of the environmental movement which has done much to change the legal and regulatory landscape in the past half-century.[414] Utilizing the health and danger nexus is another proven way to extract environmental protection from existing legal pathways, but without necessarily venturing into fundamental rights territory. The problem though utilizing the human health/environmental pollution connection is the double-edged sword of limited scientific information and intervening temporal aspects.[415] The connection between the environmental pollution and harm—negative health outcomes—has to be quite strong to get the legal ball rolling here. Science is not developed to a level yet to always allow for tight derivations. And while science will progress on many fronts, harms continue to be perpetrated and

[413] Section 4.3.2.1

[414] See Lazarus, Richard J. The Greening of American and the Greying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States. *Va. Envtl. L.J.* 20 2001

[415] Section 2.2.

justice remains delayed. Furthermore, even as science evolves, the nature of the most pressing spectre utilized to motivate environmental clean up, cancer, means that our bodies' own ability to heal will work against establishing connections.[416] Using derived environmental rights from human rights sources does not run in to this problem.[417] Does it, however, affect environmental justice outcomes?

Thirdly, the majority of literature on environmental justice centers on the problem of siting and permitting programs.[418] The reason that this strand is so prominent in the U.S. literature is because of the momentum lent by the earliest incarnation of environmental justice discourse–environmental racism. Regardless of the name,[419] this problem for justice is the concentrated siting of environmental burdens in and around well-defined demographic groups, be that racial or broader socio-economic criteria. Whether it is intentional and targeted (racism) or a more complex outcome (aggregation) is not critical to answer. Chapter 3 brings the assertion under the economic umbrella of early valuation studies and current agglomeration studies in geographical economics while using the established environmental justice literature to support allegations of prevalence. How do the protections derived above deal with the siting and agglomerations problem, bounded by the mechanics of spatial economics?[420] That is, is there enough protection to stop the ratchet of economic decisions from continually impacting certain areas over others?

Following closely on the heels of assertions of racially-motivated pollution siting and its less-intentional cousins is the lackluster cleanup record in and around the neighbourhoods from which environmental justice complaints arose. Such was especially clearly illustrated in the U.S. by Lavelle and Coyle[421] and picked up by the administrative problems in European cases like *Taskin*. The EHR protections though clearly have some bearing on unequal procedural application, just as they have something to say about the bar put on public participation in environmental matters. While grassroots organization plays a central and lauded role in the U.S. literature, Chapter 2 questions briefly

[416] Section 2.2.1; Greaves, Mel *Cancer: The Evolutionary Legacy*. Oxford University Press, 2001

[417] Section 4.3.2.2

[418] Sections 3.3,3.5,3.6.

[419] Section 3.1

[420] Section 4.3.2.3

[421] Lavelle, M./Coyle, M. Unequal Protection: The racial divide in environmental law. *The National Law Journal*, 21 1992, and Section 3.5.3

whether shouldering disadvantaged groups with the start-up costs of organizing for environmental clean-up is a true success.[422] Certainly grants toward informational exchange are necessary for proper debate, but procedural guarantees in environmental decisions must be backed up by actual power in the public. The threat of the minority becoming the majority must be a credible threat lest the guarantees of public participation serve only to exhaust the minority of society through constantly coming together to utilize public participation. The goal in guaranteeing public participation is a backstop, granting actual political power to the minority is a forward check on environmental uses that may not be in their best interest.[423] To what extent then can the derived protections enable empowered public participation and information flows of the sort desired by environmental justice advocates?

The section concludes with mention of what derived EHR-protection does not cover relative to the environmental justice problem. This is as useful as an illustration of what is protected. It draws a picture of what is left to do, what cracks are left to be filled, should one hope to move toward environmentally just outcomes. This is especially helpful to the U.S., where one would have to engage the EHR mechanisms so open in the ECtHR through the less straightforward constitutional and civil rights pathways, the topic explored in the final chapter.[424] As the two areas—Europe and the U.S.—continue on their paths of environmental choices, this is the comparison that will become telling and the metric of success versus failure.

4.3.2.1 Problem 1: Democratic Disenfranchisement

The environmental cases detailed above leave one notion very clear: the people must have access. This is access to information, through both the Aarhus Convention and Article 10 ECHR, as well as access to courts via Article 6 and full, effective remedies to breaches of guaranteed rights via Article 13. Does this level of access suffice to solve environmental justice problems? This is not an entirely clear question to answer *in abstracto*. As the next chapter shows, however, the remedy and access provided by the EHR protections are far more developed and open to environmental ends than the analogous routes in the U.S. In fact, attempts to expand the U.S. pathways have met with resistance,

[422] Section 2.1.4
[423] Section 4.3.2.4
[424] Chapter 5

difficulty, and most recently, a roadblock.[425]

Knowing that outcome it is easy and appropriate here to remark on the multitude of pathways to provide access toward justice in the human rights system in Europe. While there is no substantive right to have one's voice heard in cases of environmental despoliation, or even a definite assurance that a particular environmental problem will be able to engage the human rights protections—there connections to underlying civil rights can, after all, be ruled too tenuous given the particulars—the fact that there are multiple paths is very positive for the ability to redress environmental justice problems when and where they arise. That is a general comment but holds particularly strongly for environmental justice-related disenfranchisement. The government is bound by at least an analysis of margins of appreciation. To take a decision they must consider the impact on the individuals and their safety and peaceful enjoyment of rights within that impacted area. This is an individual weighing, and not a group analysis. Therefore, it need not be the case that the group impacted is indeed finding it difficult to access political routes toward change, or even political routes toward recognition. Further, in the European case, there is no indication of judicial effort to restrict these pathways; the gates are open. While there hopefully will take place a clarifying and solidifying discussion, as would be beneficial for each individual route as well as for creating a unified outward appearance, there is no roadblock on the horizon for citizens who believe their rights have been stepped on by the State in their decisions over the environment.

With regard to access to information, secured through either Aarhus compliance or the *Guerra* standards, information for the individual is only somewhat secured. It may not be enough information or the level of information the individual hoped to receive for purposes of decision making, but it does render the fact that they belong to a numerical minority affected by environmental pollution moot. The government cannot pick and choose when and where to dispense the information they have and must be wary of information they choose not to pursue as the activities which they regulate increase in foreseeable danger. In a sense then, the individual aspect of human rights short-circuits the problem of minority-imposed environmental burdens.

The same can be said for access to the Courts. Through the derived EHR

[425]See Section 5.3.2.5, discussing specifically the *Alexander v. Sandoval*, decision, along with *South Camden Citizens in Action* (Section 5.3.3.1)

protections, States are put on notice that complaints must be able to find their way in to the Court systems, and that valid remedies must also exist *and* be properly carried out once awarded. Thus, the environmental justice advocate tunes their argument of disproportionate environmental burdens to a failure of domestic systems to protect and remedy their civil rights complaint. Should the environmental problem indeed have a nexus to that civil right, the individual's minority status does not matter and the environmental justice outcome is achieved with existing protection. Should there not be an adequate underlying right on which to argue the State's failure, however, then there is another problem. But this problem is not due to the numerical minority problem of environmental justice; the clustering and agglomeration of industries and, by probable extension, pollution around any definable group—that is, the environmental justice problem—is not in fact the issue. The issue instead is that society has yet to issue protection deemed or perceived adequate for this individual. As such, any grassroots campaign for political change should focus on increasing the substantive level of environmental protection so that a claim that the state has failed to provide that protection can move forward. This does not necessarily have to be a substantive right to a certain quality, or an environmental justice protection for a certain grouping or class of people but could be, for instance, a substantive level of oversight or regulatory presence near more dangerous facilities. This is not though an environmental justice problem but the more omnipresent environmental questions of modern industrial impact.

The more general problem can itself have democratic issues though. They are different from the complaint that pollution impacts certain definable groups more heavily. It can still be a complaint by a spatially definable neighbourhood group that there is an environmental failing, but they are no longer implying that this is a general phenomenon. It is an individual case of concentrated pollution aggregated across an area of inhabitants. The claim is then a class action, but not an environmental justice complaint based on minority status or socio-economic classification. The area may still have to rely on grassroots campaigning to convince a majority to notice the problem as the problem may not affect the majority directly. A palpably different debate than environmental justice would ensure because the traditional environmental justice complaint requires an implicit argument that such conditions happen often or predictably to this definable grouping. The latter carries an implication that

it is somehow more morally reprehensible than the former.

One can also see that the right to remedy plays out differently in these two scenarios. The remedy to protect the underlying civil right is different than a remedy for an environmental justice right. They may effect the same outcome but there is a subtle difference.[426] Elaboration of that difference takes place in the following chapter, but in brief, in the individual case there must be a weighing of the problem relative to the individual's rights while in the mainstream environmental justice framing of the problem, there must first be a definably weaker or minority group. That minority then garners attention via potential discrimination. The ECtHR jurisprudence, while admittedly being more open to the question of a nexus between environmental conditions and fundamental protections, also has a shorter distance to travel between environment and right. Even here though access to courts indeed not provide the kind of protection to entirely solve environmental justice problems. It is a step, though. A step in the right direction, perhaps, and a step away from the specific environmental justice claims and toward a more general and direct connection between humans and environment. Furthermore, it is a step backed up by several harder backstops.

4.3.2.2 Problem 2: The Insufficiency of Health Problems

The problems of consistently linking health outcomes and environmental triggers discussed in Chapter 2 is no problem for derived EHR-protections. In fact, there need not even be an inquiry into the health consequences of environmental damages in the European Court.[427] The hard connection is between fundamental guarantees in the Convention and their application in practice. If there is a fundamental right to a certain quality of environment, then the process guarantees of Articles 10 and 13 certainly give strong procedural claims to anyone alleging an inadequate domestic environment by way of pointing to health outcomes; does the state live up to its own guarantees? But even outside of this still-rare situation,[428] Articles 10 and 13 lock down the ability for an individual placed in a dangerous environmental situation to question their State's performance with established Convention obligations. The State

[426] A subtle difference ripe for future papers and especially inquiry as to which would be more effective and practicable.

[427] See *Fadeyeva*

[428] See Boyle *Fordham Envtl. L. Rev 18 [2007]*; Hayward

may live up to their procedural requirements, but substantively fail to protect life and home under Articles 2 and 8. The various combinations here have broad protection for health via environmental impact, implying also coverage for environmental justice.

The process here is to link problems with established obligations. While the EHR literature continues to grow in its own theoretical right, the ECtHR jurisprudence expands on more tractable grounds, grounds which avoid the problems of causality illustrated in Section 2.2.1. Briefly, in all but the most egregious of cases, statistics can fail to support a causal connection between chemicals or environmental insults and eventual health defects. The causes of such failure are legion, but can stem from problems of small numbers of victims relative to the "well" population at any given time, and large deviations in the onset of symptoms or problems. The marvelous healing machine that is the human body works against establishing causality for legal purposes as well, at least in current construction. This is not to denigrate the health outcomes; environmental damage is real and costs human lives and livelihood. Showing that damage though and then utilizing it to propel change in environmental regulation has met with less success than one would hope given the background levels of concern with modern society's growing impact on the natural environment.

A derived environmental right is, in essence, protection for the natural environment that comes as a byproduct of protecting humans. There are those who would like to protect the environment in its own right, and feel that it has strong moral connections with the existing human rights discourse.[429] Both factions have used health concerns to motivate legal discussion. But neither the individual nor the Court must weigh in to epidemiological debates when utilizing human rights in the manner illustrated in the European Court. Here it is not even bending an old protection to a new usage, a tactic used heavily in the U.S. that will be discussed in the following chapter.[430] The ECHR generates protection of existing rights, pure and simple. Any protection to the environment is incidental. States guarantee a right to life and a right to home and family life. As activities which the State permits threaten those rights, violations occur. The fact that the violations are in the form of creeping smells,

[429] Intergenerational concerns also play a role, where one desire not only to argue on moral grounds. See Hiskes.

[430] Chapter 5.

noises, creeping pools of waste or unsafe industrial practices do not need to be linked to health outcomes, other than to illustrate a magnitude of intrusion commensurate with non-environmental violations.

The simplicity of the EHR approach brings with it power. There is no new judicial ground to break or competences to test. And it is not weak protection either. The protection takes a stern view of protecting human life in the face of industrial danger. Currently, the Court's view of danger limits to foreseeable events, but as science evolves and becomes more consistent in linking environmental insults on the body to health outcomes, tenuous linkages suddenly become firm legal precedent. So there is protection today, without full knowledge of the environmental connections to human security and familial connection, and that protection is presumably only going to increase as tenuous assertions receive more empirical support.

Should scholars or policy advocates move to bump up the current support then? Moving quickly toward establishing firmer substantive environmental quality criteria is likely to meet with political and judicial resistance, lying as it does in the realm of new rights and new competences along with forcing greater obligations on the regulatory State. More favorable and suggested by the momentum in the Court itself would be to simply continue testing and pressing the European Court with cases which, though environmental in outcome, firmly connect a State's existing duties under Articles 2, 8, 10, and 13, to the impact on the individual. Environmental degradation will continue to encroach on protected spheres the more damage humans do to the environment. This is far from perfect protection and also suffers greatly from criticism that it will be chiefly *ex post* adaptive protection, enacted only after tragedy and human suffering. But the point is that the EHR protection overlaps completely here with the protection needed for environmental justice outcomes. Both have appealed to the health/environment nexus in the same fashion and so share the same umbrella here.

Also germane to the problems of environmental justice especially in discussion of agglomeration, is that degradation will be expected to impact certain individuals and areas faster than other groups. Firmly establishing both substantive criteria where impacts impinge on existing rights, and procedural safeguards that States must have in place to prevent those situations from arising puts increasing and established weight on the State to watch out. That watching out shifts some of the criticism off of *ex post* heavy analysis. Knowing

that there is a gravity to the agglomeration leaves less time to dawdle and less recourse for the State to claim they met their obligations when environmental calamity does occur. That is, strengthening the known ties does as much as possible to put pressure on States to prevent environmental injustices, without moving into health outcomes or attempting to define substantive "safe" aspects of quality environments.

Öneryildiz shows the environmental justice advocate that truly horrendous outcomes are actionable on human rights grounds. *Hatton*, *López Ostra* and *Guerra* expand the duties of the State into protecting the home, family life, and information flows which enable those rights to come to fruition. All of these situations could easily fit under the heading of environmental justice, though in some cases without the strong minority overtones. This is already a wide net of responsibility. The more cases which explore such situations, the tighter the existing weave becomes. Adding to the edges means playing with the emerging science though; trying to connect environmental degradation and lapses in Convention duties at the edge is working with the weaker data of a learning society. Strengthening the data will allow us to build on to the net, but for now there is much protection to be had on the inside.

The motion implied by derived EHR protection suggests advocates would be well advised in bringing dangerous situations to the attention of the State, laying a paper trail of warning should anything occur. As science works to ground connections between environmental insults and dangers to life and well-being, advocates of EHR-approaches to human protection should work to point out as many cases as possible where States are headed down paths which have led to infractions of the ECHR before. The two prong approach expands the derived protection in a fashion harmonious with the expanding jurisprudence without leapfrogging into unknown territory.

Still there remains a weakness of leaving explicit protection for human health outside of human rights documents, as well as environmental health, in that as this two prong approach operates there will remain a lack of ex ante power for citizens. Ex post actions are much more powerful in the established framework. But as the number and severity of warnings increases, the nexus moves beyond Article 2 protections and in to Article 8 protections, and the more cases which are tested by the Court, the clearer it becomes what States have to provide their citizens in the way of access to information, court oversight, and remedy for potential problems with EHR protecting the same area as environmental

justice would have protected. For example, *Hatton* and *López Ostra* raise the duties on the State to validate the margins of appreciation awarded to them by the Convention. This is the right direction for anyone hoping to utilize extracted EHR protections toward environmental justice ends.

The State knows now that the European Court will wade deeply into each case, weighing the merits of each individually, to assess whether the State did indeed protect home and family life. One can hope that this will create a more vigilant state apparatus, and all by utilizing what protection exists and allowing the science to come into its own. The protection leaves something to be desired in the sense of foresight, however, relinquishing some of the power of the people just where the U.S.'s experience with environmental justice would want it to be strongest: pollution and hazard siting decisions.

4.3.2.3 Problem 3: Siting and Agglomeration

How do the protections derived from the European Convention deal with the siting and agglomerations problem, bounded by the mechanics of spatial economics? That is, is there enough protection to stop our environmental playing field from tilting? There are certainly individual checks for when one finds themselves in a "tilted" position. But this is only part of the environmental justice problem. The central environmental justice issue, at least as defined by the U.S. literature, is the consistent and arguably predictable tilting toward certain groups. Identifying the groups within pollution agglomerations and cataloging their racial and socio-economic makeup is what made the case for widespread injustice and pointed toward incorporating increased protections for such situations. It was only the lackluster performance in identifying magnitudes which stopped the momentum of the effort. Does derived EHR though put a check on the tilting process, or throw a monkey-wrench in the mechanics of Chapter 3?

The first and most prominent piece in the U.S. environmental justice literature remains this claim of environmental racism, or the concentrated siting of environmental burdens in what in many cases is areas of racial minorities. As much as the title has changed to environmental justice and expanded into social justice, and public health, policy management, and general jurisprudence have diluted that flavour, there is a still an aftertaste running through much of the literature. Chapter 3 though goes on to illustrate how the research in

the U.S. specifically has failed to solidify this perception in statistical studies, at least as far as the racial component.[431] The studies though do not rule out agglomerative dynamics which impact groupings who presumably find it both difficult to change the situation and facing continued influxes of environmental burdens. That conclusion flows simply from the agglomerative dynamics of modern industries and an assumption that if the impact encroached on a majority of the population, there would be no political problem in stopping it. There is no need to discern the makeup of the impacted group.

Although the statistical work has yet to incorporate the existing research on spatial agglomeration into models of the clustering of environmental disamenities,[432] there is nothing in the theoretical or empirical literature to suggest that the problems identified by environmental justice will not continue to be real problems for a subset of society, especially relative to the majority of the population. The updated models of geographical economics[433] only back up what the earliest valuation studies in environmental economics accomplished at the dawn of the environmental movement,[434] at least relative to environmental justice issues. While they are certainly more sophisticated and their insights incorporated immediately into empirical environmental justice inquiries, we are still simply showing that different locales in space have different economic values. And when decisions on environmental usage are taken inside political and bureaucratic pathways, if that clustering happens to impact a racial or socioeconomic minority, there is no reason to think that they will be well positioned to impact the outcome.

The reasons that the ECHR and its derived-EHR protections could stop this dynamic have, for the most part, already been mentioned. In the first degree, as both economics and epidemiological work becomes more sophisticated, states cannot hide behind a claim of ignorance. States must provide a modicum of environmental protection via established rights. As they become more aware of what impacts environmental damages have on humans, the tilting becomes much more of a problem; putting another polluting facil-

[431] As do more intensive appraisals, notably Bowen, William An Analytical Review of Environmental Justice Research: What Do We Really Know? *Environmental Management*, 29 January 2002, Nr. 1; Bowen/Wells; Bowen, William/Haynes, Kingsley E. The Debate Over Environmental Justice. *Social Science Quarterly*, 81 September 2000, Nr. 3

[432] Bowen, William M/Atlas, Mark/Lee, Sugie Industrial Agglomeration and the Regional Scientific Explanation of Perceived Environmental Injustice. *Annals of Regional Science*, 43 December 2008, Nr. 4.

[433] Section 3.4

[434] Section 3.2

ity, or failing to clean up an old facility, in an area with clustered burdens is now *more* likely to breach a state's margins of appreciation on how to utilize their environmental resources while staying within their Convention obligations. There is a mechanism by which choices which otherwise enable tilting become more and more difficult to justify.

Whether or not this is sufficient for the eradication of enough environmental insults is unlikely, and one need only reference the continued discussion on EHR for evidence. Derived protection exists but does not reach a level hoped for by advocates or satisfactory for those concerned about health and human development within industrial modernity. If it does not provide sufficient coverage for pure environmental concerns, it is likely to have strictly less protection when seen addressing environmental justice claims. Without a formal claim to "no tilting" there will still be room for downward motion imposed by the State. The protection as illustrated here pushes back against that but the margins of appreciation allowed leave room still for relative differences. These differences might indeed remain problems of environmental injustice. Their magnitude though finds a backstop on EHR protection and pushes back harder the more work emerges on environmental insults and human health and happiness. Even without progress in science the known linkages can be brought to bear on the State to provide procedural protections commensurate with the dangers, agglomerated as they may become.

In the Court's establishment of derived protection lies the seeds for greater protection. Greater substantive protections were predicted above in Section 4.3.2.2 in that advocates and the judiciary should be focused on elucidating and tightening the established links between environment, human impact, and the protections already guaranteed. When one considers the evidence—theory and empirical—pointing toward agglomerative tendencies it becomes hard to argue that failures to watch out for that gravity will continue to pass muster. For the environmental justice focused within the EHR, then, the goal becomes to point out to State and Court that there must evolve a relevant consideration of the agglomeration of environmental problems in assessing the State's duties to protect life and livelihood. Procedural guarantees follow along the same logic. As the danger of environmental encroachment increases, as it will with the agglomeration of polluting activities, the state's margin of appreciation for deciding that it is a relevant use of their resources shrinks, and duties to allow access to information and legal proceedings similarly grow. Without specu-

lating too far, the Court has enunciated that duties to protect increase with danger and burden. Thus, adding information on the clustering of pollution only increases the power of the individual and the protection their existing rights already grant relative to the ECHR.

Therefore, this is also the first point where we must mention Article 14, the guarantee of equal protection under the law. The hypothetical question exists here, as it has been initiated by the environmental justice literature, do existing laws grant the same protection across all similar situations? In the situation of industrial agglomeration, and assuming concomitant pollution agglomeration, can the State meet both their substantive duties to protect and their Article 14 duties to protect equally? At a minimum, Article 14 coupled with derived-EHR protection places its own pressure on the State to take a stance on keeping local environments in regulatory check, above the flat duty implied by *Öneryildiz*, *Hatton* and others where the assumption is that each person is being protected at a minimum standard. Given the limited resources of any state agency though—a motivating factor for staying away from entangling themselves in too many positive rights—applying the law evenly over an agglomerated industrial landscape will arguably not protect all inhabitants equally. Those already burdened by more forms of pollution will find themselves in a hole, so to speak, one which the evenly-spread positive obligations does not help them out of, at least relative to its ability to raise citizens not already placed in a pollution hole.

The counter argument would be that the Court evaluates situations on a case by case basis; if there is an individual complaint arising from a certain area, it does not matter if they have *more* pollution than an area removed from them. It only matters whether the State has fulfilled their substantive and procedural obligations under the Convention relative to whatever level of insult to which the individual is exposed. The worse the environment insults, the more the State must do to assure compliance. *Öneryildiz* and especially *Hatton* speak to the ability of the State to allow insults so long as they monitor safety or take measures to minimize both personal and pecuniary damages. This is in an individual right, and thus weighed on the nexus of individual impact.

While this is certainly true for the substantive measures of life and living space protections, there is a greater question as to whether the procedural guarantees of Articles 6, 10, and 13 would not be implicated if shown that the individual were subjected to agglomerative environmental insults. Is one's

access to the Court's processes and remedies reduced by the number or magnitude of simultaneous burdens which they fight? Article 14 clearly provides protection against having different doors to the Courts for different people. But for the case of environmental problems, problems lying in to the area shown above as derived protections for the environment, does the Convention protections for access to process and remedy have to rise when there is agglomeration potential? If the agglomeration cycle continues, and a particular area, group, or even minority is found to be constantly fighting to prevent pollution from slipping into their depressed topology, is the law truly protecting them? Is it the effective remedy and protection envisioned by the Convention to have industries routinely breach a threshold and then be pulled back by regulatory apparatuses initiated by the human rights obligations? Or is it rather to provide a safe sphere where society need not be constantly vigilant to point out encroachment? Does protection have to remedy the gravity of the tendency to cluster, or provide greater protections from it? Given the individual focus in human rights and the Convention itself, the answer is in itself likely negative. In conjunction with Article 14, however, there is room for consideration.

Although there is not room to consider all ramifications here, hopefully with these roads now paved inquiry can spend less time in transit from "traditional" environmental justice to this point of departure. For the meantime, however, suffice it to say that the addition of Article 14 to the derived EHR picture, combined with the environmental justice situation, continues the forward pressure for States to protect against environmental encroachment. The substantive and procedural guarantees in the Convention do offer a level of protection against the agglomerative concerns of environmental justice, putting at least a progressive brake on the tilting if not a firm prohibition. The protection against tilting is, however, mostly derived from the individual protection and does not directly address the unequal propensities. The immediate focus of research in this direction should then be to first answer whether the coupling of Article 14 with what we know about agglomeration does impose duties on the State, and to what extent those conditions are currently met. In the meantime, there are more immediate routes for advocates to explore for protection against unequal environs.

4.3.2.4 Problem 4: The Lack of Public Empowerment

Given the current milieu, the most used weapon for those looking to push back against the tilting of environmental problems is simply public participation. While the above all rely on, for the most part, backwards-looking strategies, public participation advocates getting people in the door while regulatory decisions are made. Whether or not the Court must take in to consideration the increased forces agglomeration puts on individuals in certain situations, their ability to participate in decision making must reach a proscribed level. How well does the derived EHR protection do in securing a place for concerned voices? And how well does that protection address environmental justice concerns?

Like the protections against health encroachment, there is full overlap here between derived EHR protections and environmental justice problems. The goal under both is to empower the individual in their relations with the State. The ability for voices to be heard in planning processes is to be measured as a function of meeting procedural duties. But the State is given wide margins as to how it sets up its machinery to regulate the environment. Thus, there is plenty of room for structures where public participation on the front end of decision making is not the norm. To some extent, there is protection from being completely shut out of the discourse by the European Court's acknowledgment that a citizen need not exhaust domestic remedies if remedies do not realistically exist.[435] Even when an individual then cannot affect aspects of the State's environmental decision making machinery, but the outcome of that machinery can foreseeably impact their fundamental rights, the individual has standing at European Court. Their chances of reaching the Court itself may be small but their ability alone places duties on the State to prevent the need. This may be relatively weak preventative power, given the time, energy, and uncertainty involved with bringing a claim, either against the domestic apparatus or the Convention. Nevertheless, it does provide a toehold for public participation relative to environmental decision making, grounded in established human rights precedent. Given that EHR mechanisms are derived a toehold is not a bad start.

An equally important safeguard is provided through the Court's recognition of effectual remedies. The foot dragging in *Taskin* and interference provided

[435] *Guerra*, para 49.

by the Government was seen by the European Court in their role as an impartial observer of domestic processes as a circumvention of judicial and binding decisions. Decisions by the lower courts clearly established that the issue was a question of a civil right under the definitions in the Court's jurisprudence,[436] and one which was directly in question given the situation.[437] That is, the foot-dragging led to a circumvention of civil rights, as defined by the Court, and hence deprived the applicants from their right to fair trial.[438] The people had access to a trail but the outcome was ineffectual. Importantly here, there was no regard to the probable and long-term outlook of the harm alleged.[439] The people must not only have access but the legally binding outcomes must come to fruition. Thus, public participation, while not guaranteeing an outcome to the benefit of the public, does guarantee that the outcome decided happens.

There is then a significant backstop to make sure any gains made by public participation—or frankly any other methods towards environmental preservation—do not go unfulfilled. Nevertheless, it bears repeating there is no requirement for a *particular* remedy,[440] and the *Taskin* case reaffirms that domestic legislatures are given wide margins to decide what remedy is adequate and sufficient. Here the Court noted that the rights of Article 6 only require that the possibility of remedy exists. That is, the aims of public participation, should the truly be affected by human rights, must have a remedy available, but it need not be the remedy most preferred by the group alleging the problem. Addressing the problem, though bounded by the requirements and duties of the Convention, has some latitude. In fact, a particular outcome might be beaten back by an initial claim of violation but reemerge successful, albeit delayed, by following proper procedures under rectified government oversight. Of course, if the ap-

[436] para 130

[437] para 133. Note process for interpretation laid out in *Zander v. Sweden* Application no. 14282/88, judgment of 25 November 1993.

[438] This reflects *Bryan v. the United Kingdom*, application no. 44/1994/491/573, judgment of 25 October 1995 judgement where the Court found that the High Court's ability to strike down an unfair or impartial ruling, if one occurred, was enough to secure the possibility of effective remedy under Article 6. That is, the decision making body must be sufficiently independent. See, inter alia, *Langborger v. Sweden* application no. 11179/84, judgment of 22 June 1989; *Leander v. Sweden*, application no. 9248/81, judgment of 26 March 1987.

[439] Also see *Okyay and others v. Turkey*, application no. 36220/97, judgment of 10 December 2005.

[440] For instance, there is no positive obligation to allow an applicant to prosecute or convict those responsible for harms.

plicants still do not believe their interests were protected adequately by the State, there should be avenues for appeal.[441] There is a lot of room for back and forth, a positive for public participation in general but not allowing much certainty toward outcomes preferred by environmental rights advocates.

The goal in guaranteeing public participation is a backstop, and granting actual political power to a numerical minority is a forward check on environmental uses that may not be in their best interest. Best interests though might be far above the lower bar for adequate protection of interests. Given that the environmental protections here are all derived rights, it is more than likely that the best environmental outcomes and those secured by the Court diverge significantly. This is of course the complaint of mainline EHR proponents, that derived protections cannot be relied upon to do "enough." But the ultimate goal of human rights, and by extension, of environmental human rights, is to provide an environment worthy of human dignity to all. Dignity does not always arrive by getting one's way. Nevertheless, the goal of securing dignity is naturally forward looking. It may not be forward looking enough, but one hastens to note that although one would not want despoiling to necessarily occur before engaging the right, a truly negative EHR would not engage positive duties but rather disallow government actions. The absence of government (the duty-bound object of the right) would not necessarily prevent degradation. With that in mind, comparing the limited forward protections of assuring participation but not substantive outcomes does not necessarily compare so poorly.

Even in failures of participation to prevent problems the government would later be forced to take remedial action.[442] It is clearly better to have agreement from both sides as to the use of the environment, the distribution of the benefits of that use, and the acknowledgement, monitoring, and containment of the burdens. Ensuring some degree of public voice is a step toward this. Work however needs to be done on the correct way to structure this. Procedural rights and obligations are a step in the right direction but certainly do not solve all problems nor does it tackle all dynamics of the back and forth.[443] Too much blocking power on either side (eminent domain) sees unilateral outcomes

[441] Council of Europe *Manual on human rights and the environment*, p. 18.
[442] cf. Hayward, p. 150
[443] See discussions in Hartley, Nicola/Wood, Christopher Public Participation in environmental impact assessment-implementing the Aarhus Convention. *Environmental Impact Assessment Review*, 25 2005; Spyke. Also grassroots work done in the U.S. by Fraser.

more than would be efficient, economically speaking.

But even an in depth study of the justiciability and outcomes of derived-rights enabling public participation would miss an important level of the discourse: the social impacts. Courts are only one way to enforce a law. The strongest way, perhaps, but not necessarily the only way. With environmental justice, which so clearly arises from distributed decisions and responsibilities on how the environment will be used, duties and the pressure they exert can arise outside of courts. It is the duty of all to actively decide how to use the environment without, of course, impinging on the uses aspired to by others, especially not to deprive those "others" of uses which you yourself enjoy. But this pressure need not always act through courts. By putting a strong stamp on public participation and the rights of individuals to voice their opinions in environmental matters is a strong social statement in and of itself of the respect due to environmental opinions.

Some have called this as a form of political enforcement. Branco, for instance, states that

> "[i]f society, with regard to the enforcement of economic, social and cultural rights, cannot be accountable before a court of law, it must still be accountable before individuals in the shape of voters. In other words, as far as economic, social and cultural rights are concerned, legal justiciability could, and perhaps should, be replaced by political responsibility."[444]

Environmental justice concerns have as mentioned concerns about political representation. But even though the political enforcement might be lessened in environmental justice cases, it still plays a definable role in EHR-type protection. And, to the extent that environmental justice concerns flow from a lack of voting power among those effective, EHR-like protection via Branco's extra-judicial channels would have to take note of environmental justice concerns to provide coverage.[445] They need, however, to be explored in future research.

The conclusion in examining the coverage of derived EHRs, and by extension the protection against environmental injustices, the lack of public participation guarantees is the largest gap in environmental protection that could

[444] Branco, p. 13.
[445] See discussions in Chapter 2.

realistically and presently be addressed. How far procedural guarantees, and how far the impact of individual-tuned policies such as those indicated by the Aarhus Convention go to cover that gap, is open for debate. Like the above discussions, there is certainly a level of support here though.

4.3.3 Conclusions on Derived Protection

A great deal of derived environmental protection exists in the European Convention, that much is clear. That derived protection goes a long way towards addressing the concerns raised in the EHR literature. It also goes some way to addressing environmental justice concerns, such as disenfranchisement, limited evidence linking damage to health outcomes, the tendency for economic activity to cluster, and the lack of public empowerment to address manifestations of any or all of these. Protection of environmental justice concerns however are notably derived just as the environmental protections. Thus, the extant protections do not solve the problems entirely. That admittedly would be a high fence to clear given the way that problems keep emerging as our knowledge of our impact on humans via our environmental choices grows. Nevertheless, the positive attitude and expanding scope of the European Court lends much hope to continued utilization of this pathway toward environmentally just outcomes, especially relative to the picture in the U.S. discussed in the next chapter.

To foreshadow, much of the success in the ECHR framework comes from its focus on individuals, a hallmark of fundamental rights. Groups of people—a numerical minority—-exposed to an environmental burden are protected as individuals. Individuals are protected from intrusions in to the life, their home, and their possessions as well as provided procedural pathways to check State maneuvers in and around their infrangible spheres. The kind of legal analysis necessary to examine human rights instruments are more developed and diverge less from strict interpretations of the guarantees granted by the ECHR and therefore allows for easy overlap extending into environmental realms. Extending existing rights into environmental realms has not been successful in the civil rights approach taken by the U.S. Hence, this chapter suggests a significant positive development in the desire to address the growth of disproportionate burdens. Again, the approach does not solve environmental justice issues. It does, however, address many.

In the individual approach via human rights, there is no mention of com-

paring their status as a member of a larger group to the members of another comparator group. This is quite beneficial in terms of avoiding legal problems of constructing comparator groups. In fact, there is already a general literature critical of what is known as this "comparator problem"[446] within legal thought on discrimination emanating from the U.S. Naturally then it trickled into thoughts on environmental justice and racial motives. Briefly stated, from the point of view of a plaintiff concerned that an outcome stemmed from discriminatory origins—that the outcome is unnatural and steered by biased hand—the overarching question is whether alike things were treated alike. While this sentence is vague, it quickly reveals the problem; how do we define what makes things "alike?"[447]

McColgon[448] uses the example of *Powell v. Pennsylvania*[449] to quickly illustrate the problem. The US Supreme Court (US Court) confronted a statute which placed restrictions on producers of margarine but not on producers of the arguably analogous product, butter. Given that butter and margarine are at least partial substitutes in the economic sense, did these regulations deny equal protection of the laws as per the 14th Amendment, guaranteeing equal protection of the laws for all citizens of the U.S? The US Court rather brusquely dismissed the claim, drawing a tight line around margarine producers and a separate one around butter's manufacturers. As long as the law applied to all margarine producers equally, the law was granting equal protection.

This sort of logic though, as U.S. lawyers now know, does not make for conclusive analysis. The landmark *Loving v. Virginia*[450] saw that analysis must go further, at least in certain cases. There, a ban on a white person marrying a "non-white" tried to hide inside this same margarine-logic, claiming that what is applied equally among all whites could not be unequal for the purpose of the 14th Amendment. The judges' ruling went to the logic of the

[446]The term comparator first appeared in U.S. jurisprudence in *Spaulding v. University of Washington*, No. C74091M, 1981 U.S. Dist. LEXIS 17951 at *18 (W.D. Wash. Dec. 17, 1981), *aff'd*, 740 F.2d 686 (9th Cir. 1984), *overruled in part on other grounds by Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987) cf. Sullivan, Charles A. The Phoenix from the *Ash*: Proving Discrimination by Comparators. *Alabama Law Review*, 60 2009, n. 193.

[447]The handy idea of treating "like alike" is meaningless without simultaneously proposing criteria to determine "likeness." See discussions in, inter alia, Westen, Paul The Empty Idea of Equality. *Harvard Law Review*, 95 1982

[448]McColgon, Aileen Cracking the Comparator Problem: Discrimination, "Equal" treatment and the role of comparisons. *European Human Rights Law Review*, 6 2006.

[449]127 U.S. 678 (1888).

[450]388 U.S. 1 (1967).

law over the letter.

The comparator problem points to these differences and begs us to answer why we draw comparator group boundaries where we do. Perhaps it was easy to overlook such a question when confronted with an argument between butter and margarine, easy because there is not much on the line. It is just as easy to overlook the boundary problem in 1967's Civil Rights milieu when confronted with *Loving* where so much is on the line as to push the judicial question so far away from the boundary concern. That is, the situation was so egregious, so literally black and white, that judicial competences were not called into a grey fog. So the fact that neither of these cases arguably sat near the boundary and that many similar cases followed in their footsteps has kept legal scholars from examining comparator issues as central in any case of discrimination,[451] be it racial, gender, or disproportionate public good provision.

In situations like we find in environmental justice cases, however, it is much more likely, as illustrated in the U.S. literature to which the next chapter turns,[452] that we are going to run into the necessary and difficult task of defining boundaries. It is equally likely that opposing sides will be able to choose arbitrary comparator groups conducive to their argument. The goal of the defendant becomes not either to show that they did not treat the plaintiffs differently *or* to show that the plaintiff belongs to a group dissimilar from the group to which they are comparing themselves. Naturally the dissimilarity has to be justifiable but leaves much room when one moves away from egregious cases of racism; the environment has proved a fair deal removed from cases of clear racism.

The ability to be arbitrary is a weakness to any law which enables it and choosing comparator groupings retains a degree of that arbitrariness. But this is not a new problem. The existing judicial logic, in both the U.S.[453] and the ECtHR,[454] place much weight on first establishing one's similarity to an external group before alleging discrimination took place. Work then proceeds to inform how best to choose and rigorously define the boundaries of the comparators.[455]

[451] This point is taken up in the recent Sullivan *Alabama Law Review 60 [2009]*

[452] Chapter 5

[453] Ibid.

[454] Janis/Kay/Bradley, Chap. 9.

[455] Sullivan has recently expounded the rationale for comparator group usage in the more charged employment discrimination situation and found that introducing expert testimony regarding comparators is helpful and necessary in drawing boundaries in that context.

From an environmental justice perspective, the use of expert testimony in defining comparator groups should be both easier and already enabled by the approaches of the empirical science. This has not, however, proved to be the case. Not only is a spatial metric hard to identify, but the U.S.'s distinct civil rights evolution puts more weight on the decisions which led to discriminatory outcomes, rather than simply the difference in treatment that emerges.

In U.S. discrimination cases, around which much of the work on comparator groups in environmental justice situations revolves, the case rests on the question of inferring intent to discriminate, a topic touched on in Chapter 3.[456] The drawing of the comparator group around a suspect classification—a metric of distinction having little or no rationale except to enable discrimination—enables this inference, often by bringing in evidence that the decision-maker has in other situations a proclivity towards a preferred group over the claimants group. Offering evidence to the contrary helps support the defendant's decision.

As the environmental justice literature in the U.S. showed, the intent-hurdle is virtually impossible to show in environmental justice-situations, and the lack of legal support to questions of discriminatory impact nearly perfectly hinders any forward progress for advocates. The focus broadly speaking has been how (re) enable such pathways, or barring that, how to move the discussion above or around the dead ends. Evidence of wider gates and lower bars in the ECHR stands in contrast to this problem and a big difference is the utilization of individuals versus the intrinsic group dynamic of discrimination inquiry.[457]

The next chapter turns to examine the U.S. situation in more detail in order to ground this comparison. This chapter should have clarified both how and to what extent the ECHR has been successfully expanded to include protection from environmental issues. It would be very beneficial if somewhere in the literature there existed a grading criteria for the level of protection offered by EHRs. Alas, the topic is too new, and the jurisprudence still too spartan, to develop such a measure. As such, the discussion remains, for the time being, in the area of rhetoric. The take away is nevertheless a feeling that derived EHRs have a useful—and potentially powerful—role in environmental justice's future. That does not imply that the ECHR needs an EHR tuned to environmental justice nor is this more evidence for fundamental right to

[456] Specifically Section 3.3.1 and 3.3.2.
[457] Regarding lower bars to the ECHR see San José.

environmental rights. States are still wary to be put on the hook for positive duties, and rationally so when it comes to the environment. Environmental issues encroach in on modern life in so many ways, and yet the problems stem from the industries and technologies from which we derive "modern life" itself. Perhaps the ultimate irony is that the War which brought us the UDHR and the instruments of human rights we know today also brought us the synthetic chemicals and a reliance on science which created much of the pollution with which we are now dealing.[458] Perhaps it is then fitting that we close the circle by pitting the beneficial offspring of the world's most terrifying war against its detrimental progeny. And the problems experienced in the U.S. make a good bookend for the benefits of the ECHR's individual approach, allowing a personal weighing of rights and the environment in which they enjoy rights.

[458] Rachel Carson, whose epigraph opened this chapter, notes the connection between WWII science, chemical warfare, and the pesticide (biocide) catastrophe as early as 1964. Carson, p. 16

5 Back to the Future: The U.S., Environmental Justice, and Rights

> If the Bill of Rights contains no guarantee that a citizen shall be secure against lethal poisons . . . it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem.
>
> *Rachel Carson*

Although the U.S. literature played the main role in the last chapters of this work, giving birth to the issues which took hold and became the movement of environmental justice, the preceding discussion on human rights was able to cover much ground environmental justice ground without a mention of the U.S. Although civil rights play a central role in the U.S. environmental justice discussion there is not the same positive feeling as to its auxiliary ability to protect the environment. The pessimism is rather encompassing because the U.S. turned nearly exclusively to civil rights protections against discrimination in their attempt to safeguard against environmental damages via fundamental rights. Those pathways, while once holding some promise analogous to that illustrated in the preceding chapter, now have serious legal roadblocks. Furthermore, should those roadblocks be bypassed there still remain the hurdles, largely due to viewing the issues entirely through the lens of discrimination, that lent lackluster protection in the first place. These high hurdles toward applying solitary civil rights to environmental protection

are quite a bit more problematic than a similar roadblock would be at the European Court, given that the environmental justice approach in Europe is multi-axial, rotating through more rights-protected areas than the U.S.'s focus on anti-discrimination. This chapter brings the positive outcomes of derived-EHR protection in Europe back to discuss the shortcomings in the land where environmental justice got its start, comparing and contrasting processes and outcomes.

A direct comparison must be a careful run thing though. Relative to the experience in Europe the human rights discussion in the U.S. resides on a different level; there is no top-down expansion of individual rights nor any international pressure. Again, there is some mixing in the discussion of levels of law at this point. Notably here there is a discussion of Constitutional Law—mainly focused on the Fourteenth Amendment—but also a significant discussion on the Civil Rights Acts—here centered on Title VI of the Civil Rights Act of 1964. Here however the fact that the major anti-discrimination provisions have achieved quasi-constitutional status in the U.S. means that overlap is less problematic. The rather tight focus on anti-discrimination as protection in the U.S. remains the relevant comparison.[1]

Though one must mention the Inter-American Court of Human Rights in passing, its influence on U.S. legal discourse is so minimal relative to the influence exerted by the ECtHR that no direct comparison is (yet) warranted.[2] The U.S. has, however, taken explicit notice of the human rights focus and logic in some of their recent high-profile cases.[3] The global move—cautious to be sure—toward economic and social rights, both in the explicit yet goal-orientation form of the ICESCR and the indirect but tangible forms in the

[1] Though one hastens to note that there are other potential sources of derived rights, including procedural rights in the Fifth and Fourteenth Amendment. These are more rarely employed because of elaborate requirements in statutory law. This is especially true in the law governing federal agencies and their decisions, which come in the form of promulgating regulations: the Administrative Procedure Act (APA), 5 U.S.C. 500 *et seq.* The cumulative effect of the bits of protection available within the U.S. regulations may indeed be substantive. This however needs to be considered in rather intricate detail and is left for later research once the broader comparisons here have been firmly established.

[2] Recent influence of the Inter-American Court on U.S. policies toward accused terrorist detainees in Guantanamo Bay however deserve note. See Koh, Harold Hongju; Ignatieff, Michael, editor Chap. America's Jeckyll-and-Hyde Exceptionalism In American Exceptionalism and Human Rights. Princeton University Press, 2005. The general milieu around such a weighty topic however bars simple inferences like the U.S. becoming more open to international human rights oversight.

[3] *Lawrence v. Texas*, 539 U.S. 558, 577-8 (2002)

ECtHR,[4] requires measures often involving market intervention by coercive elements, something to which the U.S. has not been particularly warm. This has been a relatively new development, however, and this chapter begins by quickly clearing the air and showing that there is no specific barrier to the U.S. adopting more economic and social protections.[5] It is rather the culmination of subjective elements of U.S. legal evolution which steered toward the landscape we see today, a rights-landscape focused tightly on anti-discrimination.

That discussion lends naturally to an illustration of the ways in which the civil rights of the United States have not extended to protect new areas as have the protections of the ECHR.[6] There is much detail here, given the long and contentious legal history surrounding efforts to eradicate racial discrimination. To ground the discussion the section focuses on illustrating the ways in which environmental justice literature itself has documented the failings of applying existing rights toward protecting new areas, a cue taken from the approach in Chapter 3 of illustration by example. The discussion on growth of ECtHR jurisprudence in Chapter 4 highlights the utility of the multiple existent rights in deriving environmental protections relative to the confined focus in the U.S. on rights protecting from discrimination. The conclusion is that either the U.S. must open up their civil rights protections to new areas or begins to apply other areas of existing rights protection to the environmental problems highlighted by their own environmental justice discussion should they desire to address the general statement of the problem of environmental justice expounded in Chapter 2 and mirror the success on that pursuit shown by the European approach.

5.1 A Fine Place for Rights

An explanation as to why the U.S. did not enjoy the expansion of rights-protected areas as the ECHR, especially in environmental realms, could start with the current overarching antipathy toward economic rights. The cold reception though is a relatively recent phenomenon and therefore forces re-

[4]Note however recently: Osiatyński, Wiktor *Human Rights and Their Limits*. Cambridge University Press, 2009, p. 36-37, discussing the move away broad definitions and goal-orientation of the late 1940s rhetoric on human rights, toward using justiciability as a yardstick for what could become an enforceable right.

[5]Section 5.1

[6]Section 5.3.1

search to dig deeper. This section touches quickly on how the current situation evolved noting most importantly that there are no structural barriers to increasing the scope of rights while building toward the discussion on the particulars which hindered the extraction of newer rights.

Aversion or antipathy to positive or second-generation rights was not always the case in America. Perhaps the best and most powerful illustration of this is Franklin Roosevelts proposed Second Bill of Rights in his State of the Union speech in 1944.[7] The proposal, which would have guaranteed rights to a home, job, living wages, medical care, education, and economic protection from detrimental but largely unavoidable circumstance bears many similarities to the goals embodied in the European Convention. The temporal connection to the UDHR is obvious[8] but notable that it was popular enough to be brought into the political discussion at that level. Coming at the end of the successful New Deal the Second Bill of Rights could have continued a very drastic transformation of the role of government in the U.S. Basing their current opinion on a more recent and literal interpretation of the wording in their national constitution, however, U.S. courts now, over a half-century later, view rights guaranteed to citizens to be negative in nature. The idea is to limit state power to act instead of positive requirements to guarantee standards.

The focus today is thus negative in nature; the forward-looking Second Bill of Rights is all but forgotten.[9] Nevertheless the anecdote illustrates that the shift in focus has a cultural and subjective component and is not structural and legal; there is no direct institutional barrier against social and economic rights in the U.S. In fact, the U.S. Congress has heard several proposals for an environmental right, both on the heels of the civil rights years and more recently.[10] Though there is measured resistance to reading the Constitution as

[7] Fleischacker, Samuel *A Short History of Distrubive Justice*. Harvard University Press, 2004, p. 82-83.

[8] As is the involvement of his wife, Eleanor, in the United Nations and the writing of the UDHR after FDR's death.

[9] *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, (1989). cf. Steiner, Henry J./Alston, Philip *International Human Rights In Context*. 2nd edition. Oxford University Press, 2000, p. 252; noting in contrast Brennen J.s dissent that inaction can be just as much of an abuse of power as action on the part of the State.

[10] See H.R. J. Res 1321 90th Congress (1968); HR J. Res. 1205, 91st Congress (1970); HR.J Res 33, 108th Congress. (2003). cf. Hill, Barry E/Wolfson, Steve/Targ, Nicholas Human Rights and the Environment: A synopsis and some predictions. *Geo. Int'l. Envtl. L. Rev.* 16 2003-2004, n 132 The American Public Health Association recommended a constitutional amendment to guarantee that citizens would be free from the harm of pollutants. Schrader-Frechette, Kristin Human Rights and Duties to Alleviate Environmental Injustice: The Domestic Case. *Journal of Human Rights*, 6 2007

living document in the sense that the ECHR is read,[11] the echoes of proposals for positive-type rights allow for a discussion of why such rights did not appear, either in later legislation or via derivation.

The failure to expand rights in general, and the failure to derive environmental protections in particular, was also not for a lack of noticing the possibility. Anderson and Miller noted explicitly the possibility as far back as 1977.[12] Prior to the emergence of a strong environmental movement and government regulations in environmental directions, environmental scholars noted the possible constitutional recognition of an environmental right. The idea follows from analysis of the U.S. Constitution's Ninth Amendment—rights are reserved to the people which are not specifically given to the states. That interpretation emerged under *Griswold v. Connecticut*.[13] There the U.S. Court[14] expressed an opinion that certain private liberties were protected by the "penumbra" of expressed guarantees in the Constitution. That is, the right in question is

> "necessary to make the express guarantees of other provisions fully meaningful. . . "[15]

Above the Ninth Amendment's reservation of unspecified rights there were also penumbra aspects read from the Third Amendment's prohibition of quartering troops in private residences, the Fourth Amendment's protection of the

[11] There is extensive U.S. constitutional literature on the subject. For environmental justice-relevant discussions and introductions, see though Mank, Bradford C. Can Administrative Regulations Interpret Rights Enforceable under Section 1983: Why Chevron Deference Survives Sandoval and Gonzaga. *Fla. St. U. L.* 32 2005, p. 860-864, and footnote 116, as well as Idem Suing under 1983: The Future after Gonzaga University v. Doe. *Hous. L. Rev*, 39 2003, p. 1463-64. Also note that the federal structure of the U.S. may itself poses a barrier to an environmental right's inclusion in the constitution, though this is not the same as a structural bar to economic and social rights. Hill/Wolfson/Targ, p. 390. The U.S. Court of Appeals , in *Flores v Southern Peru Copper Corp.,* 343 F.3d 140 (2d Cir. 2002) at 161 took a limited view of other second generation rights such as health, and even noted that the right to life itself can be

> "boundless and indeterminate. They express virtuous goals understandably expressed at a level of abstraction needed to secure the adherence of States that disagree on many of the particulars regarding how actually to achieve them."

Nevertheless, a dim view is not an impossible view.

[12] Anderson, Frederick R./Miller, Alan S.; Husimi, Kodi, editor Chap. Fundamental Rights and Environmental Quality In Science for Better Environment Fundamental Rights and Environmental Quality: Proceedings of the International Congress on the Human Environmental. Pergamon Press, 1977, p. 828.

[13] 381 U.S. 479 (1965). . cf. Ibid.

[14] The term U.S. Court is used here to refer to the Supreme Court in order to emphasize the comparison with the European Court: the ECtHR.

[15] Ibid.

security of the person and the Fifth Amendment's guarantee against personal incrimination. Without the level of privacy at issue in the case several constitutional protections would not be effective.

The need for certain levels of privacy to meet the needs of citizens to enjoy their Constitutional rights quite naturally links to the discussion of effective enjoyment of rights in the ECtHR; there is shared logic in that rights must be effective to be rights. Similar penumbra derivations though did not take off in the intervening decades in U.S. jurisprudence, especially not relative to the environment nor the movement in Europe. This is not without some good reason, including the rise of environmental regulation and the Environmental Protection Agency (EPA) which, among other things, deemphasized other paths toward environmental control.[16] Suffice it to say at this level of abstraction that there are pathways in U.S. legal history which, generally speaking, could have led down a road parallel to that followed by the ECHR. For a few reasons, none of which being a change in the foundational or bounding laws, the rights discourse did not evolve however.

The simple illustration here tells that the U.S. is not structurally hostile to the idea of economic and social rights. As further support, Sunstein[17] explored this question and came to the conclusion that the present chill picture is also not attributable to some degree of American exceptionalism. He concludes instead that it is a directional change in the interpretation of the Constitution relative to government-provided benefits after the election of Richard Nixon in 1968.[18] A change in the majority view of interpreting the Constitution is a much different situation though than a definitive structural judgment on the boundaries of the Constitution. The changes in the makeup of the Court

[16]Another problems could be a concern regarding the potential for political capture as well. The use of a constitutional right for political ends via the environment and policy setting is not what the Constitution was designed to guide. A U.S. constitutional right is properly restricted to protecting the safety and well-being of individuals. Given what was said about the tenuous links between environmental and health—a link still as legally problematic now—this problem remains substantive in addition to any legal rationale. See Anderson/Miller, p. 842. Also note discussions of alternatives to regulation promulgated by Yandle, Bruce *Common Sense and Common Law for the Environment*. Rowman & Littlefield Publishers, Inc., 1997; also Morriss, Andrew P./Yandle, Bruce/Dorchak, Andrew Choosing How to Regulate. *Harv. Envtl. L. Rev.* 29 2005

[17]Sunstein, Cass R.; Ignatieff, Michael, editor Chap. Why Does the American Constitution Lack Social and Economic Guarantees? In American Exceptionalism and Human Rights. Princeton University Press, 2005.

[18]Nixon appointed Warren Burger, Harry Blackmum, Lewis Powell and William Rehnquist, three conservative justices whose weight potentially changed the then-expanding recognition of economic and social rights.

created the gravity of today.

More specifically, the 1960s saw the U.S. Court extending requirements on the State to provide for the poor in certain situations. In *Harper v. Virginia Board of Elections*[19] the Supreme Court interpreted the 14th Amendment to proscribe the poll tax.[20] The Court "effectively ruled that states must provide the vote free of charge–even though it is expensive to run an election."[21] Thus, the state must actively provide an entitlement—an example of a U.S. duty to secure a right through active motion on the part of the State.[22] It was this motion that slowed with the change in mentality.

The intervening years and change in makeup changed both the cultural and judicial momentum in the U.S. It has never been easy to change (amend) the U.S. Constitution,[23] but interpretation of its proscriptions has swayed through the Court's history. Had the change in direction not occurred, however, Sunstein confirms that there is indeed enough latitude in at least the 14th Amendment to accommodate economic and social rights.

> "An interpretation of the Fourteenth Amendment that called for social and economic rights would not, in fact, be much more of a stretch of the document than many interpretations that are now taken for granted in American constitutional law."[24]

Cases, such as *Harper* and other entitlement-expanding decisions[25] speak also to this conclusion. And although they came to the Court because of situations where poverty is reducing a citizen's ability to exercise their citizenship and thereby creating an entitlement,there remains room to argue that sufficient environmental damage could reach this level of citizenship reduction.[26] This

[19] *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966)

[20] This was above the proscription by the 24th Amendment which applied to federal (national-level) elections.

[21] Sunstein *American Exceptionalism and Human Rights*, p. 106.

[22] We avoid talk of positive and negative rights here as, given both the present tendency away from such speak in the literature and following also Cass Sunstein with Christine Jolls, who remind readers that all rights presume some expenditure or existence of costly infrastructure. Jolls, Christine/Sunstein, Cass R. *Debiasing through Law*. National Bureau of Economic Research, Inc, November 2005 (11738). – NBER Working Papers ff

[23] See, for instance, the Equal Rights Amendment of 1972 and discussion in, inter alia, Berry, Mary Frances *Why ERA Failed: Politics, Women's Rights, and the Amending Process of the Constitution*. Indiana University Press, 1988

[24] Sunstein *American Exceptionalism and Human Rights*, p. 106.

[25] Such as *Goldberg v. Kelly*, 397 U.S. 254 (1970).

[26] See Chapter 2, also Holland, Breena Justice and the Environment in Nussbaum's "capabilities approach": Why sustainable ecological capacity is a meta-capability. *Political Research Quarterly*, 61 2008

sits generally well with other interpretations of the foundational rights guaranteed by the United States, in that they are "counteracting the disparity of power between the state and the individual."[27]

At the very least though there is no blocking derived-rights in the U.S. In fact, the cooling of sentiment towards positive duties might simply keep—or have kept—the discussion to a lower level than Constitutional protections as well. Sunstein suggests that political guarantees of minimum security would find their way into U.S. laws with less resistance than constitutional rights and, again by extension, more easily than the interpretation existing rights toward new ends.[28] The point though is that the individual liberties preserved in the Constitution are seen as analogous to the human rights provisions in the ECHR and are not explicitly barred from similar evolution. On the former point, consider the telling story from Osiatyński's recent book:

> In 1990 I was invited by the University of Chicago to teach human rights. The dean of the law school was a recognized constitutional scholar. One day, after he and I had become friends, he asked me to tell him what exactly I was teaching in my human rights course. [...] When I progressed from general theory to the details of the freedoms of speech, expression, and association, he exclaimed what I was teaching was, in essence, the very same thing he was teaching in Constitutional Law I and II. I then realized that, for American, human rights was an export product.[29]

The general lacking of positive rights relative to the ECHR then is at least arguably a temporal factor with room remaining to bring in a discussion of expanding rights, whether they enter at the Constitutional or legislative levels. The protections aimed at by the framers of each system appear analogous.

[27]Sinden, Amy Climate Change and Human Rights. *Journal of Land Resources and Environmental Law*, 27 2007, p. 6, citing *Stanley v. Illinois*, 405 U.S. 645 (1972), esp. 656: "Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."; *United States v. Carolene Products Co.*, 304 U. S. 144 (1938); and *Wolff v. McDonnell*, 418 U.S. 539 (1974), esp. 558: "The touchstone of due process is the protection of the individual against arbitrary action of the government."

[28]Increasing the power of judges seems to be problematic in garnering support or momentum for constitutional rights. Keeping the guarantees under the purview of Congress creates, apparently, less concern. Sunstein *American Exceptionalism and Human Rights*, p. 101

[29]Osiatyński, p. xvii.

The remainder of the chapter tackles the issues within existing law that truly constrain the possibilities of evolution as one wonders why some sort of emergent protection never emerged. For the topic at hand, why did the environment find almost no extracted protection? Naturally there are many potential answers of varying breadth and depth. The discussion here in the remaining bulk of the chapter parallels the structure of the preceding chapter, detailing here first the lack of environmental justice protections extending from established rights and moving to clarify the details why. Many of the reasons are bound up in the cases themselves and so are presented simultaneously. While that may prove a dense exposition the parallels with the preceding chapter should guide the reader. Evidence from the environmental justice movement in the U.S. shows a very limited protection in an area where the ECHR shows broad protection even though in both cases no explicit claims to protection are warranted. That power in the ECHR is incomplete protection to be sure but just as certainly a more promising pathway for environmental justice advocates than the path left open now in the U.S.

The evidence presented here focuses on the strong protections against discrimination in the U.S. both because it is central to the environmental justice discourse there. Moreover though the focus is justified because of anti-discrimination's powerful position in U.S. law, culture, and politics. Their centrality overshadows any talk of rights to home and familial connections which played a central role in the European discussion, at least as far as environmental justice is concerned. Despite the inability to compare directly rights-to-rights between documents and legal traditions, the fact that the U.S. failed to extend protections out of some of their most powerful laws for social change makes it hard to argue that protections could be forthcoming out of weaker protections. That conversation should certainly be had—a hard position to argue still may end up leading to a beneficial outcome—but the focus of this work is on initiating the comparison with European successes and so moves onward from this arguably stable assumption.

The conclusion here is clear: rights-based protection in the U.S. did not lend to derived-EHR protection and by extension fall short of overlapping with environmental justice protection. The experience also shows that existing rights discourse in the U.S. is unwelcoming to the environmental justice incorporation seen in the smooth meshing of environmental justice and human rights in Europe. All of this occurs despite the U.S. being structurally open to such in-

corporation. As such, a substantial overhaul of civil rights machinery would be necessary to push the current U.S. trajectory toward environmental justice-protecting outcomes available through the ECtHR's network of influence—judicial and legislative, international and domestic—in Europe. Barring that, protections weaker in American law relative to the ECHR protections could be initiated into the environmental justice fold and then expanded in the environmental direction.[30] The chapter concludes with a discussion of what might be necessary to bring the U.S. rights in line with the ECHR protections.

5.2 Discrimination and the U.S.'s Rights Culture

The aim of the body of this chapter is to illustrate the level of success in deriving environmental protections and hedges against environmental injustice in the U.S. experience. That level is relatively lower than the European experience. Similar to Chapter 3 this section utilizes the mainstream environmental justice literature to illustrate the claimed tendency. The discussion attempts to remain at the highest levels of U.S. jurisprudence though some forays in to lower court cases are necessary.[31] The U.S.'s environmental justice literature shows quite clearly that the tendency is away from what directions adopted by the ECHR.

The U.S. environmental justice canon focuses on two legal categories: rights-based approaches to rectifying environmental injustices and regulation-based approaches.[32] The former includes primarily analyses of the Equal Protection Clause of the US Constitution and the Civil Rights Acts, while the latter includes the myriad regulations implemented by the EPA. The focus of this

[30] Sections 5.4.2, 5.4.1, 5.4.3.

[31] Staying at the highest levels allows for connection to the closer parallels between the European Court of Human Rights and the U.S. Supreme Court. According to Gomien, Harris, and Zwaak

> it could be said that in many respects, the theory and practice of the European Convention on Human Rights parallel the theory and practice of the United States Supreme Court more closely than any domestic system operating in Europe. Gomien, Donna/Harris, David/Zwaak, Leo *Law and practice of the European Convention on Human Rights and the European Social Charter.* Council of Europe Publishing, 1996, p. 19

[32] Luke Cole breaks down environmental justice approaches into more categories. That well-cited paper was classifying along the lines of promise for advocates though. See Cole, Luke W. Environmental Justice Litigation: Another Stone in David's Sling. *Fordham Urban Law Journal*, 21 1994

research though is on the former. While the second naturally does lend protections to the environmentally burdened, as it assuredly does in Europe as well, the concern here is addressing the democratic failings which lock certain groups in problematic environmental states. That is the broadest concern illustrated by the many points of environmental justice concern and that which elevated the inquiry to questioning at the level of fundamental rights. The supplementary or parallel protection that regulation grants against the tilting of environmental burdens should certainly occur. That does not however detract from the need to address the rights aspects of the American story.

Addressing the unique American history requires a shift in terminology at the outset. The conversation here differs from the preceding as the term "minorities" refers to *racial* status. The term is a subset though of the broader concern with simple numerical minorities and hence can be retained with no loss of generality. Starting then with the broadest and most powerful of environmental justice-applicable rights' protections then leads to the Equal Protection Clause's (EPC) bar against discrimination under the law, a protection contained in the Fourteenth Amendment to the U.S. Constitution. Akin to Article 14 of the ECHR the EPC guarantees that no state can deny to any person equal protection of the laws. It was enacted in the wake of the United States Civil War to guarantee the rights of former slaves in all states. Its power, resting as it does in the highest law of the land, is formidable, but makes it often impractical to wield in environmental—and therefore environmental justice—-situations. Discussion herein remains short but remains nonetheless to give background to the reader for understanding the Civil Rights Acts which followed.[33]

The Civil Rights Acts provide broader protection against discrimination. They are more tailored to the cultural history of the U.S. When referring to *The* Civil Rights Act, most are referring to the sweeping 1964 Act. This occupies the foremost position in environmental justice comments as it contains the important Title VI. Title VI of the Civil Rights Act of 1964—its formal title—was not however the only legislative work extending protection to minorities below the constitutional level. It was however the most sweeping and arguably effective. There were also the Civil Rights Acts passed in the wake of the Civil War and Reconstruction though, including Acts of 1866, 1871,[34]1875,

[33]Section 5.2.1

[34]which contains §1983, discussed infra at Section 5.3.3

followed by more in 1957, 1968,[35] and 1991. They are all connected in broadly addressing shortcomings or loopholes exploited in the protections of the EPC.

With an eye to the discussion on the ECHR one might question how loopholes exist in discrimination protection. The problem with the EPC was the Supreme Court's holding in *The Civil Rights Cases*[36] that Congress lacked authority to outlaw racial discrimination by private individuals or organizations via the enforcement provisions of the Fourteenth Amendment. The holding thus found the Civil Rights Act of 1875 unconstitutional. The problem with outlawing discrimination outright remains to this day.[37] The Civil Rights Act of 1964, however, legislatively bridged this gulf by appealing to the powers granted to Congress by Commerce Clause.[38] The landmark Civil Rights Act of 1964 attacked segregation by prohibiting discrimination by agencies receiving federal funding, a power extending from the Congressional allowance to regulate interstate commerce. A multitude of state and local functions draw funding from the federal government and would have difficulty existing without it. The Act therefore compels their compliance with congressional anti-discrimination directives not via direct legislation—outlawing discrimination—but through their budgets.[39] The teeth of the Act in lie with the "power of the purse." The picture immediately emerges though of a piecemeal approach to securing equal rights, functional but residing on a different plane than the human rights discussion.

The powers of the purse though push deeply into environmental protections as the U.S. federal government disperses most of the funds to regulate the environment via the EPA and their subsidiaries. There is then an immediate connection from environmental agencies to this powerful non-discrimination statute. Such a connection is exactly the type of area where one might claim a violation of existing rights via environmental problems. Drawing funds from the government in pursuit of environmental regulations at state and local levels must adhere to non-discrimination standards. If the dispersal of funds

[35] which contains the Fair Housing Act, FHA, discussed infra at Section 5.4.2

[36] 109 U.S. 3 (1883)

[37] *United States v. Morrison*, 529 U.S. 598 (2000)

[38] Specifically, Title II of the Civil Rights Act of 1964 draws its authority from Article I, Section 8, Clause 3 of the U.S. Constitution

[39] This fact, some would argue, sets the boundaries of the Act's power, enabling regulations to make monetary allocative decisions. See especially Lambert, Thomas A. The Case Against Private Disparate Impact Suits. *Ga. L. Rev.* 34 2000, p. 1221-5

results in a discriminatory environment then there is a derived-right to some degree of environmental protection. The wide net cast here makes Title VI the most important catch for environmental justice hopes in the U.S.[40] Operating through the lens of discrimination however ends up limiting its reach and recent judicial decisions make it almost impossible to utilize in a derived-EHR manner.[41]

The Civil Rights Act of 1964, sweeping as it was in its attempts to blot racism out of American public culture was not the first such attempt. In a previous response to compelling private compliance with the anti-discrimination goals of the United States, the Congress enacted the Civil Rights Rights Act of 1871 which contains the important §1983. §1983 provided a path for civil action against anyone accused of depriving others of their rights. In the general course of U.S. law, violations of constitutional rights such as the EPC result in an injunction against future insults. It does not however reach backward for rectification. Without §1983, one could make the claim that there is protection without remedy. With it however citizens have a method to enforce the rights granted to them in the Constitution.[42] In its early life it enforced and redressed private violations of the First Amendment and the EPC, two frequent targets of openly racist movements.

The situation is quite stark within cases of majority parties acting to withhold voting rights, civil protection, or education opportunities from minorities, prominent problems meant to be addressed in the U.S. with the adoption of anti-discrimination laws. The applicability of §1983 however blurs when one moves into environmental cases. Repositioning §1983 as a tool to derive environmental protection for minorities currently occupies an unsteady position in the environmental justice arsenal because of recent court rulings disputing whether agency regulations—specifically EPA regulations requiring agencies to take no actions having discriminatory effects[43]—confer *rights* in the direct sense as do the First Amendment and the EPC. If the agency's actions do not create a right there is nothing for the section to operate on and to enforce. The nuances of this section of the discourse do much to limit any expanded protection from §1983.

Briefly discussed in addition to the most powerful anti-discrimination statutes

[40] Section 5.3.2
[41] Sections 5.3.2.5,5.3.3.1
[42] *Monroe v. Pape*, 365 U.S. 167 (1961).
[43] Discussed infra at 287

so far utilized toward environmental ends is the Fair Housing Act (FHA),[44] a component of the Civil Rights Act of 1968[45], which similarly ties actions which harm minorities' equal access to housing markets to anti-discriminatory goals. In this fashion, the FHA can dovetail with the economic logic behind environmental justice dynamics, as outlined in previous sections[46]. Because environmental concerns directly impact housing markets, this becomes a valid pathway for addressing environmental justice concerns. It is though less tried in practice than either Title VI or §1983. It is more useful here to illustrate that in the wake of the debates on impact versus intent standards for inference of discrimination[47] settling on an impact standard may still carry too little power. Though standing and an discriminatory impact standard exist in FHA action it still does not appear as ripe for expansion into environmental directions.

These three prongs, all stemming from different Civil Rights Acts form the majority of U.S. environmental justice cases. Compelling citizens to be color-blind on their own was, and unfortunately remains, a sizable challenge given the unique history of the U.S. The combined power of the Fourteenth Amendment and the Civil Rights Acts still cannot reach into some corners of discriminatory behavior.[48] As such, they all remain imperfect armour against discrimination. The specific ways in which they have evolved to handle discrimination without pushing into other areas of life though limit not only their effectiveness against discrimination but now limit their applicability toward deriving environmental protections. Thus, they remain insufficient generators of derived environmental protections relative to the ECHR. The following sections detail these shortcomings in more detail, starting with the broadest protections of the Constitution.

5.2.1 The 14th Amendment and Equal Protection

The Fourteenth Amendment of the United States Constitution provides for equal treatment of all under the law. Specifically, coming into existence after the Civil War, it makes sure that states cannot "deny to any person within

[44] Infra at Section 5.4.2
[45] 42 U.S.C. §§3601-3631 (1998), sometimes referred to as Title VIII
[46] See infra Section 3.2
[47] Discussed in Section 5.2.2
[48] Such fundamental problems are discussed infra at 273

[their] jurisdiction the equal protection of the laws".[49] Hence, it is known as the Equal Protection Clause (EPC). Despite the Declaration of Independence's 1776 claims that "all men are created equal" it took over a century and a civil war before the U.S. government began to define the legal structures to enforce the philosophical background. This fact, albeit stated in a deliberately strong form, embodies the U.S's long struggle to rudder the often opposing and turbulent currents of moral philosophy, prevailing culture, and capitalism through the rule of law.

Just as the UDHR and ECHR picked up the pieces after the destruction of the Second World War, the EPC aimed to stitch the U.S. back together after their most devastating conflict. In this sense the US Constitution takes on more character than simply the supreme law of the land; it is interpreted as the moral compass of the nation. The introduction already mentioned the ways that compass can shift, but the language of the document cannot. Largely a function of the period in which the Constitution was written, the document declares its rights in absolute terms; the EPC is no different. Here is a difference to the tuned definitions of rights, complete with details on abrogation, in the ECHR.[50] Perhaps because of this tendency the U.S. courts have been pushed to interpret small pockets of flexibility around absolute protections.

The EPC pushes against racism while staying in line with other constitutional provisions, especially the Establishment Clause, which "rules out valuations that assume certain conceptions of what is sacred, at least those that invoke religious commitments."[51] Even though religious norms may penetrate deeply into American private life, they are viewed as too contentious to find use in public life. This is an interesting point that has bearing on the lack of derived protections from the EPC as the Establishment Clause and the Free Exercise Clause bear on the interpretation of discrimination in legislation. These two religious freedom guarantees allow for government intervention into the religious sphere although religious practice is guaranteed in the First Amendment.[52] The interference is allowed through the passage of neutral laws which incidentally impact greater on some religions than others. Rather bold

[49] U.S. Const. amend. XIV, §1

[50] Janis, Mark W./Kay, Richard S./Bradley, Anthony W. *European Human Rights Law.* 3rd edition. Oxford University Press, 2008, p. 253.

[51] Sunstein, Cass R. *Free Markets and Social Justice.* Oxford University Press, 1997, p. 95.

[52] Compare to Article 9, ECHR.

examples include prohibitions of polygamy and of sacrifices which could otherwise lay inside religious spheres. Such prohibitions incidentally impact some religions which hold them as beliefs. The intention however is not to proscribe their freedoms but to protect the freedoms of society at large. Naturally the invocation of words such as intent should harken back to earlier discussion on *Yick Wo* and *Gomillion*.[53] Interference without intent does not do damage to the underlying personal liberty; the fact that the interference is incidental though is important here in religious examples as in the specifics of *Yick Wo* and *Gomillion*. Discriminatory intent—here on the part of the government—is necessary and sufficient for invalidating an attempt to legislate; otherwise, the discriminatory effect—here on one religion over another—is incidental and allowable.[54]

As it was implied in discussing the early *Yick Wo* and *Gomillion* cases[55] it can be difficult to always draw bright lines around when statutes necessarily must discriminate in order to accomplish their purpose and when they discriminate due to intentional bias, be that racial, religious or otherwise.[56] Extreme cases of impacts may reveal racist intent—by precluding all explanations save for racisms—but walking back from the extreme enters foggy areas quickly.[57] One would hope that in situations questioning intentional and incidental damage, like Justice Stewart's famous quote about obscenity, the judiciary would "know it when they see it."[58] This is unfortunately not always the case. The individual sphere of protected liberty to act in their own way is a well guarded locus, whether one is discussing religious freedom or the dark-side of liberty of conscious, the freedom to discriminate. When those freedoms move from private spheres to public spheres, the government can step in to protect competing interests. But the desire to guard that inner sphere holds the government to a high standard, allowing them in only when the influence coming out is intentional and cuts against rights guaranteed to

[53]Section 3.3.2.

[54]Sunstein *Free Markets and Social Justice*, p. 95.

[55]Section 3.3.2

[56]Weinberg, Philip; Gerrard, Michael B., editor Chap. Equal Protection In The Law of Environmental Justice. American Bar Association, 1999, p. 4.

[57]Empirical works exists, however, on the prevalence of biases. See current empirical research showing vitality of cognitive bias discrimination in the U.S. in Blumrosen, Alfred W./Blumrosen, Ruth G. Intentional Job Discrimination–New Tools for Our Oldest Problem. *U. Mich. J. L. Reform*, 37 2004; Also notes and discussion in Sullivan, Charles A. The Phoenix from the *Ash*: Proving Discrimination by Comparators. *Alabama Law Review*, 60 2009, p. 226

[58]in *Jacobellis v. Ohio*, 378 U.S. 184 (1964)

the objects of influence. Viewing the issue always from within the desire to guarantee individual freedom necessarily makes it hard to "see it" in a legal sense, where those on the outside may well see the issue much more clearly in the shape of discrimination.

In the desire to balance these opposing rights lies some flexibility in full and complete equal protection, but flexibility that needs to be grounded in some structure. The U.S. Court has had, partially due to the particular racial history of the country, many instances with which to visit the vicissitudes of how government treats differently situated individuals. That is the essence of protecting against discrimination, deciding when and where differences are allowable and when they are not. To summarize though the US Court allows a classification for differential treatment by law invalid only if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [it] can only conclude that the legislature's actions were irrational."[59] That leaves significant personal room for decisions. But if that classification further has "suspect" qualities due to its historical or political position, then the level of legitimate purpose must be even higher or more precise to justify the use of classification.[60] Subject classifications, such as race, always trigger the highest level of scrutiny on the situation, while gender takes up an intermediate standard[61], and the open rational basis test for every other classification.

By breaking down analysis to the group level the U.S. Courts add both flexibility and structure into their analysis of when the private sphere extends into areas necessarily protected by other government rights, allowing for maximum personal choice when the situation is not pressurized by historical or current concern for the personal freedoms of a particular group. How strict is strict though? The degree of strictness associated with suspect classifications was illustrated in *Fullilove v. Klutznick*[62] where it was described as "strict in theory, but fatal in fact."[63] Here it was clearly delineated that classifications which trigger strict scrutiny are highly unlikely to prevail ever if they legally sanction categorizations for the purpose of differential treatment.[64] Strict is

[59] *Vance v. Bradley*, 440 U.S. 93,97 (1979).

[60] *Dunn v. Blumstein*, 405 U.S. 330 (1972); establishing necessary and compelling government interest as twin tests for allowing classifications.

[61] Illustrated in *Craig v. Boren*, 405 U.S. 330 (1972).

[62] 448 U.S. 448 (1980)

[63] at 519.

[64] The only exception is affirmative action. See *Grutter v. Bollinger* 59 U.S. 306 (2003).

thus very strict, at least when the law is intentional and applied with emphasis on certain categories of people.

Precedent states that when laws touch on suspect classifications, like minority races, or on fundamental human rights they trigger increased judicial scrutiny.[65] Scrutiny refers to the level of discretion that a court allows to litigants in their interpretation of laws and therefore is the inverse of discretion. In the case of suspect classifications the court *must* apply strict scrutiny. This is the highest level of scrutiny and therefore the lowest level of discretion which a court allows in interpretation of laws. Should a state enact a law affecting suspect classifications, the precedent of applying strict scrutiny then shifts the burden to the state to justify a "compelling state interest" for that law.[66] The requirements of strict scrutiny thus mirror the shrinking of margins of appreciation in the ECHR.

The essence of the amendment remains equal *application* though. It is suspect classifications and its requisite scrutiny which serve as the framework for utilizing the protection to actively root out discrimination; they tell judges when to raise their eyebrows that bit extra. The protection remains triggered by acts of discrimination as perpetrated *through* state actions which deny equal application, and thereby protection, of the law, heightened then by situations where equal application might be hard to assume. Through this it hoped to serve as a tool of discrimination eradication. Illustrating the commitment of the EPC to redressing racial problems is the blackletter case of *Loving v. Virginia*.[67] In *Loving*, a ban on interracial marriage did not find justification in the fact that it was a ban equally applied to blacks and to whites; it was after all just as illegal for white to marry black as black to marry white. By finding that the Equal Protection Clause meant more in context than just equally applying inherently racist laws, the US moved past a simplistic view of comparisons between groups and toward equalizing the footing of races before the law.[68] There are shadows of intention here too, covering as it did the desire to maintain a racist status quo,[69] melding with the earlier ideas of personal

But compare *Regents of the University of California v. Bakke* 438 U.S. 265 (1978)

[65] "Footnote 4", *Carolene Products* 304 U.S. 144, 153, n.4 (1938)

[66] cf. Weinberg *The Law of Environmental Justice*, p. 6

[67] *Loving v. Virginia* 388 U.S. 1 (1967). This case is a prominent early example of strict scrutiny in the U.S. jurisprudence. Karlan, Pamela S. Loving Lawrence. *Mich. L. Rev.* 102 2004 Also see *United States v. Carolene Products Co.*, 304 U. S. 144 (1938). (esp. Footnote 4).

[68] Janis/Kay/Bradley, p. 483.

[69] Karlan, p. 1447.

liberty.

This outcome turns on what it is to be part of a suspect classification. Suspect classifications, being groups (classifications) which are likely to be the the subject of discrimination, must be identifiable as such. In the U.S. that means primarily that the group's characteristics are unchangeable, a categorization which clearly encompasses race. Secondly, the group must have a history of discrimination. Third, the group must find political avenues impossible to utilize due to their status as a discrete and insular minority.[70] Notably, these three characteristics of suspect classifications do not necessarily include the poor or all groupings of disenfranchised people. Therefore, as anti-discrimination laws in the U.S. specifically focus on minorities—and thus, suspect classifications—they already have trouble reaching into protecting the environment should that environment involve a non-minority, such as a poor community.[71] The choice to frame the the environmental justice problem then as one of effecting a numerical minority stems from this lacuna. Framing the problem as a numerical minority still manages to encompass the same minority-based situations however. The choice was made at the outset to explicitly avoiding the murky and loaded questions of racial composition remaining in the U.S. framing as well as to avoid having to import those definitions into the European story.[72] Suffice it to say, forming the environmental justice problem under the umbrella of anti-discrimination protections in the U.S. very quickly places boundaries on available protection.

Application of strict scrutiny and subject classifications within the Equal Protection Clause's mandate did much to weed out overt and even cunning discrimination in U.S. laws. But the fact that one can justify the application under a compelling state interest is the first weakness in the equal protection

[70] As discussed in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

[71] Discrimination based on income does not trigger suspect classification scrutiny in the U.S. See *San Antonia Independent School District v. Rodriguez*, 411 U.S. 1 (1973). With regard to the U.S. EPA, the agency will not use race as a criteria when reaching environmental decisions. Hill, Barry E. *Environmental Justice: Legal Theory and Practice*. Environmental Law Institute Press, 2009, p. 197 . Once the decision is made, however, the agency can analyze the impact on race and income categories. This approach keeps the EPA in line with U.S. Court decisions such as *Adarand Constructors, Inc v. Pena*, 515 U.S. 200 (1995); and *Grutter v. Bollinger*, 539 U.S. 306 (2003). cf. ibid..

[72] A task that would be more difficult given some countries, like France, who do not collect or define racial data. See Bleich, Erik *Race Politics in Britain and France: Ideas and Policymaking since the 1960s*. Cambridge: Cambridge University Press, 2003; idem Antiracism without Races. Politics and Policy in a "Color-Blind" State. *French Politics, Culture and Society*, 18 2000, Nr. 3

armor. The crack runs strongly in directions away from the original purpose of the law, such as the topic at hand—environmental protection. As was illustrated by the discussion of economic motion in Chapter 3 there are many situations in which the "cause" of a disproportionate impact is not human action. Animus is naturally complicated through decision making processes—processes inherent to both law-making and employment decisions, two areas where discrimination cases are prevalent.[73] Laws can then argue for their own compelling interest and augment that with a claim of no suspect animus. The filtering of cause and outcome is enough to make a direct legal connection to the EPC's jurisprudence questionable in theory in all but the most overt cases. The "obscured intent" is precisely what we saw earlier in early environmental justicecases' difficulty in tying statistical evidence of disproportionate environmental outcomes to racial motives.[74] Absent "smoking guns" linking a decision to an intent to discriminate, plaintiffs have a difficult task applying the EPC. In practice, this was indeed the case when it came to deriving environmental application.

Further complicating the picture is the concept of legal standing. *Standing* is whether the court sees the litigant as entitled to bring judicial action against another party and have the court decide the case on its merits.[75] Standing can be seen as the ability of a party to connect themselves to a harm caused to them via existing laws. The ECHR explicitly recognizes the rights of citizens to bring complaints to the European Court when they feel they have an actionable complaint. That issue is the addressed by a committee there and decided whether meritorious (admissible) or not. There is therefore more discussion of what constitutes meritorious complaints and virtually no conversation of whether an individual in a given case has a right to bring the complaint. That is not the case in the U.S. with regard to the Civil Rights protections.

Indeed, much of this section revolves around the problems of intent and standing, motivated by the tight banding of constitutional protections, and their critical function in the lackluster protections of civil rights when applied

[73]White, Rebecca Hanner/Krieger, Linda Hamilton Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making. *La. L. Rev.* 61 2001, discussing complications to discrimination theory when decisions are the result of horizontal or vertical decision making processes.

[74]The mere existence of a non-discriminatory explanation for an outcome should not bar a finding of discrimination, although it often does, especially in U.S. jury-based trials. *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106 (10th Cir. 2007).

[75]In the U.S. defined by *Warth v. Seldin*, 422 U.S. 490 (1975).

to environmental situations in the U.S. Quick illustrations of the problem were already mentioned in the famous environmental justice cases like *Bean*[76] and *R.I.S.E. v. Kay*[77]. In all but the starkest cases of discrimination the blurred connection between the differences between races and the actions start to play a mitigating role, pushing toward a reading of unintentional outcomes and therefore placing the concerns outside the purview of government protections. The logic behind *Yick Wo* and *Gomillion* does not run strongly, let alone when environmental matters replace legislative concerns. Furthermore, when problems do not come directly from legislation and application of laws but rather from lower-level regulations and agency-based decisions there are legal questions of whether protections were designed to be utilized by citizens at that level. All of this turns what could be a straight path toward auxiliary environmental protection into a convoluted detour.

5.2.2 The Use of Intent and the EPC

This discussion on the general protections of the Equal Protection Clause brings us to central point in the U.S. literature around which much discussion—in environmental justice circles as well as civil rights law in general—revolves. This hub is the legal distinction between the intent standard and the impact standard in measuring discrimination–or equally discriminatory intent versus discriminatory effects. It is central not only to discrimination litigation but also to blocking attempts to derive environmental human rights. The reader should note that the literature uses the terms "impact" or "effects" interchangeably to refer to the standard of reading discrimination as any disproportionate situation or outcome irrespective of the animus.

Interpretation the EPC leads the discussion because of its placement in the Constitution. The U.S. Court since *Washington v. Davis*[78] has read the EPC as preventing only invidious—intentional—discrimination. That is, the amendment aimed to eradicate intentional discrimination and any continuation of intentional discrimination through state law. It does not reach through intervening filters to root out incidental discriminatory effects. In *Davis*, four times as many black candidates failed the District of Columbia's Police Depart-

[76] *Bean v. Southwestern Waste Management Corporation*, 482 F. Supp. 673; 1979. Section 3.3.1.

[77] *Residents Involved in Saving the Environment (R.I.S.E) v. Kay*, 768 F. Supp. 1144. (1991). Section 3.3.3.

[78] 426 U.S. 229 1977.

ment's written test as did white candidates. The U.S. Court found however that the test was not intentionally racist and that the plaintiffs were therefore not discriminated against.[79] There was no smoking gun of an racist plot to keep minorities out of the police force. In fact, the discriminatory effect was filtered through the contravening facts that the department actively sought minority applicants.[80] Such facts contravened the intent interpretation of the logical chain connecting the Amendment to the outcome; the discriminatory outcome could not be in violation of the Constitution because the intent of those generating the outcome was not the same as the intents the Amendment was written to thwart. That decision changed the anti-discrimination landscape where the rest of the civil rights laws now live.

In many respects, the intent standard is a strong reading of the Constitution, pulling as noted above from many angles of the U.S.'s history. Without going in to all of those details though one can already see a problem for derived EHR type rights. Consider how quickly the *Hatton* case would have been decided if the European Court only had to weigh whether the UK government intended to harm the people around Heathrow Airport. Even if it could be shown that those residents were members of some suspect classification the analysis would have been much different and the outcome far less protective of rights. It was because the people had a right directly connected to enjoyment of their home and familial connections that brought protections over environmental damages. Displacing that right into a question of discrimination makes for a very different analysis.

If one takes issue with the intent reading, there are two options: first, argue that a discriminatory outcome, whether intentional or not, is exactly what the Equal Protection Clause aimed to eradicate, and hence is per se illegal. There is much merit to this statement and also significant legal scholarship.[81] Secondly, a lawyer can move their focus back from the filter and discuss the economic, political, and even personal intervening processes which dilute or filter the flow of racism—whether intentional or latent—from action to out-

[79] But note the success of other cases, such as *Hobson v. Hansen*, 265 F. Supp. 902 (DDC, Feb. 9, 1967), which successfully challenged the outcomes of tests which had disproportional racial effects. *Hobson*, in contrast to *Davis*, focused on the tests' implications for innate ability and learning achievements.

[80] Weinberg *The Law of Environmental Justice*, p. 7.

[81] Notably we discuss one pioneering paper, Lawrence III, Charles R. The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism. *Stanford Law Review*, 39 1987 here, infra, at 5.2.2. Note also the sentiment of the Supreme Court Case *Swann v. Charlotte-Mechlenburg Board of Education* 402 U.S.1 (1971).

come.[82] That is, the lawyer must find and sum all the strands of latent and diluted discrimination to recreate the tapestry the Court needs to see to find intentional discrimination. Such a work of legal art seems nearly impossible to accomplish in the landscape of U.S. environmental injustices.[83]

The Court's focus was then on "whether a law or policy was an action directed towards a minority group,"[84] and not on whether an intent reading or effects reading is more proper. The wording of the judgement is often read, however, and indeed advances concerns that the EPC under an impact standard could open a judicial can-of-worms. If one were to see all cases where groups were unequally impacted as discrimination it would not only open the floor to many cases but could invade many protected spheres of individual liberty. One might arguably contend that the intent standard is too high and that it leaves too much wiggle room for the discrimination it was created to eradicate. Granting more power to investigations of racism however runs the risk of creating *sharper* racial dividing lines. The goal of the EPC, and later, the Civil Rights Acts, was above all to erase those lines. It is the French experience with immigration and racism that reminds us of this fact. Alain Terrenoire, who drafted the French 1972 antiracism legislation intentionally without reference to "race," explained that

> "[s]peaking of races is always a delicate matter, for we run the risk of giving credibility to the idea that there are different distinctions within the human species. That is why we must separate out the justified and necessary struggle against racism and its misdeeds

[82] One could also argue for a new viewing of intent in environmental discrimination cases. See Lewis, Browne C. Changing the Bathwater and Keeping the Baby: Exploring New Ways of Evaluating Intent in Environmental Discrimination Cases. *St. Louis U. L.J.* 50 2006

[83] The *Baldus Study*, an integral part of the Supreme Court case of *McCleskey v. Kemp*, 481 U.S. 279 (1987) highlights dramatically the issue of intent versus impact. The case dealt with the variable imposition of the death penalty in capital murder cases. The Baldus study showed that there were links between the race of the murder victim and imposition of the death penalty, as well as between the race of the murderer; Black defendants and cases with white victims had a higher incidence of death penalty sentences than white defendants and black victims. The Court found that, although the incidence was illustrated, the results showed "at most, ... a discrepancy that appeared to correlate with race, not a constitutionally significant risk of racial bias affecting ... [the] capital-sentencing process..." Hill *Environmental Justice: Legal Theory and Practice*, p. 241. This case affirmed the distinction between intent and impact as involving volition "because of, not merely 'in spite of', its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts et al. v. Feeney*, 442 U.S. 256, 279.

[84] Guill, Terenia Urban Environmental Justice Suits Under the Fair Housing Act. *Tul. Envtl. L.J.* 12 1999, p. 216.

> from the factual recognition of differences between people according to their origins, their religions, and the color of their skin."[85]

Bleich similarly reminds researchers from countries that do operate within a milieu of racial data collection that more and more powerful laws are not unambiguously better for combating racism and discrimination,[86] even if the availability of large amounts of racial data did empower the policies aimed at combating racism through the political process in the U.S.[87]

There is in addition to concerns of etching racial lines deeper into the cultural conscious a worry of how the broader impact reading could reach perverted legal outcomes. From *Davis*,

> "[a] rule that a statute designed to serve neutral ends is nevertheless invalid... if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about...a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be burdensome to the poor and to the average black than to the more affluent white."[88]

Above all of the side effects is the general problem that failing to eradicate or otherwise diminish perceived racism in step with the adoption of new tough law erodes confidence in the law as a way to bring about change and meet goals.

While this is necessarily a cursory treatment, these facts coupled with the above constitutional arguments make an arguable case for holding onto the intent standard at the constitutional level. At the very least it allows for a treatment at the theoretical level that reveals the logic as self-consistent rather than an interpretation that needs explaining. More detail is provided below with regard to the intent- and impact-standards under the Civil Rights Acts.[89]

[85] In Bleich *French Politics, Culture and Society 18 [2000]*, p. 58.

[86] Ibid.

[87] Bowen, William M *Environmental Justice through research-based decision making*. Garland Publishing Taylor & Francis Group, 2001, p. 67.

[88] at 248. Perverse effects on public expenditure legality of utilizing disparate impact standards in reading anti-discrimination statutes is well know. The classic inverted example is public transportation. Taxes which support public transportation in the United States predominantly flow to minorities and low income workers without automobiles. Under a disparate impact regime, such taxes would have a discriminatory impact against the wealthy; a "reverse" disparate impact. Inter alia Lambert, p. 1186. Also note for more extensive discussion on problems with impact standards, Lawrence III, p. 32, footnote 11,319-20,364-65

[89] The courts also find some defense here, as the do in the Civil Rights Acts' usage of

Here though it is also important to remember throughout the discussion that the U.S. Congress has legislated disparate impact wording and thus statutes have not merely been interpreted as implying an intent or impact reading by the Courts; the absence of instructive wording has meaning.[90] A blanket proclamation then of strengthening racial inquiry in the U.S. might indeed end up being counter to the intent—both Congressional and cultural—of the anti-discrimination effort and movement in that direction would be judicial activism. The U.S. Court walked a very fine line then in their laying down of precedent in civil rights law, in a milieu that was anything but receptive to judicial contemplation or wavering on the application (or disapproval) of anti-discrimination measures.

As Professor Sheila Foster summarizes the situation as it stands today,

> "[b]y definition, all discrimination claims require plaintiffs to demonstrate a causal connection between the challenged decision or outcome and a protected status characteristic. That is, when a plaintiff alleges that she has been discriminated against by a particular decision or action, she is essentially making a causal claim about the relationship between her status and that decision or action. Indeed, this causal link defines the very essence of prohibited discrimination under both constitutional and statutory civil rights law. Not all differential treatment of, or disparate impact on, an individual or group is prohibited by the law. The prohibition against discrimination is a prohibition against making decision or taking actions on account of, or *because of*, a status characteristic singled out for protection by our civil rights laws or constitutional traditions (which generally include race, gender, nationality, religion, disability, and age)."[91]

intent standards—specifically Title VI, §601—in the fact that states and agencies are free to adopt stronger downstream statements holding disparate effects themselves as illegal. This allows also for legal flexibility in applying the effects standard to more specific cases while leaving the can of worms unopened. See Weinberg, Philip Environmental Law. *Syracuse Law Review*, 55 2005, noting that other important statutes exist which do not require the intent standard, such as Title VII of the 1964 Civil Right Act (42 U.S.C. §2000e et seq.). See Section 5.4.3

[90] Sullivan, Charles A. Disparate Impact: Looking Past the *Desert Palace* Mirage. *Wm. & Mary L. Rev.* 47 2006, p. 917, noting that the Congress at the time of the Civil Rights Act of 1964's passing knew discrimination could rise up in many smaller forms—especially in employment decisions—and yet chose to focus on the more notorious form of direct discrimination.

[91] Foster, Sheila R. Causation in Antidiscrimination Law: Beyond Intent Versus Impact.

The essential points of all discrimination cases and the seminal ideas for all anti-discrimination protection—from the Fourteenth Amendment, to the Civil Rights Acts, Fair Housing Act, and Equal Employment Act—can be seen here. From the foundation, the courts have built their three-step process of searching for discrimination, encompassing 1) status inference, 2) neutral explanation and 3) causal attribution.[92]

Could there have been a significant underlying body of racist intent, however? Certainly this is possible. The presence of unconscious racism has been discussed at length in literature surrounding anti-discrimination protections in the U.S.[93] Acceptance of unconscious racism can even be inferred in the U.S. Supreme Court's enactment of the landmark *Brown v. Board of Education*[94], another definitive anti-discrimination case which ruled that the thereto legal divisions under the *separate but equal*[95] doctrine was unconstitutional. Instead of ordering immediate compliance, however, the U.S. Court ruled that there were complexities which could not be overcome immediately.[96] The complexities however were mainly the resistance of whites. Ruling in this way reserved certain racist privileges for whites, at least for a time. Chiefly, whites would be spared the presumed travesty of suddenly being sent to black schools, which were likely stereotyped as being in deplorable conditions.[97]

The holding in *Brown* recognized that stigmatizing via separate but equal is itself unequal, and hence unjust. The stigmatization though could continue somewhat more surreptitiously through delay and later through resentment from the majority. What later scholars have added to the conversation is

Hous. L. Rev. 41 2005, p. 1472, emphasis in original, footnotes omitted

[92] Foster, p. 1474.

[93] Notably, many authors have also constructed a definition for racial environmental outcomes within the this debate surrounding intention. These definitions incorporate both the Supreme Court legal tradition and the economic and social foundations which drive actions toward discriminatory outcomes—regardless of intent. See Evans, Jill E. Challenging the Racism in Environmental Racism: Redefining the Concept of Intent. *Arizona Law Review*, 40 1998, p. 1276-77; Foster, Sheila Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement. *California Law Review*, 86 1998, p.731-35; Gelobter, Michael; Bryant, Bunyan I./ Mohai, Paul, editors Chap. Toward a Model of "Environmental Discrimination" In Race and the Incidence of Environmental Hazards: A Time for Discourse. Westview, 1992, p. 64-74; and Torres, Gerald Race, Class, and Environmental Regulation. *University of Colorado Law Review*, 63 1992, Nr. 4. For a recent discussion on the continued need to fundamentally reform how the courts view discrimination, see Foster

[94] 347 U.S. 483 (1954).

[95] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[96] 349 U.S. 294 (1955), also known as *Brown II* cf. Lawrence III, p. 342

[97] Wasserstrom Racism, Sexism, and Preferential Treatment: An Approach to the Topics. *UCLA L. Rev.* 24 1977.

the fact that these stigmas are also self-perpetuating.[98] Further, stigma's impose harm whether there exists an animus behind them or not, as they travel on the wings of culture.[99] Naturally, the emergence of environmental justice themes could be seen as another line in the self-perpetuating problems of discrimination. The point though is the continual balancing of a desire to root out discrimination while remaining at a distance from personal liberties, even liberties as difficult to justify as bigotry.

Despite the larger issues at stake, there remains the precedent, set by *Yick Wo* and *Gomillion*[100] that there are some discriminatory outcomes which, even lacking proof of racial animus—intent—become inexplicable without it. In those cases, the outcome was nearly exclusively centered on minorities; a law which impacts only a minority negatively, with no majority members being implicated, wears a strong discriminatory odour. There is then a door through which victims holding negative outcomes can pass to find the protections under intent standards. How much can courts though relax the exclusive requirement illustrated in *Yick Wo*? Would one or two white-operated laundry facilities case have proved there was no animus? The focus of much discussion has been how much evidence must surround a discriminatory outcome before it is sufficient to show that the action falls within the reach of anti-discrimination statutes. The blackletter cases show that a rather large amount of circumstantial proof is necessary to connect a discriminatory outcome to a facially neutral law via an intent reading. In *Village of Arlington Heights v. Metropolitan Housing Development Co.*[101] there is evidence that a racist history can also matter in deducing a violation from effects, although again the amount of previous racist action must be rather large and overt. If the magnitude remains high in pure discrimination cases there is a lower probability of repositioning that to protect against environmental degradation.

The point here is explain but not to justify the intent standard.[102] Should

[98] Lawrence III, p. 351

[99] Ibid., p. 359, footnote 190 "In the same way that a text is detached from its author, an action is detached from the actor and develops consequences of its own. This autonomy of human action constitutes the social dimension of action."

[100] 118 U.S. 356 (1886) and 364 U.S. 339 (1960), respectively.

[101] 429 U.S. 252 (1977); Here the Court set out a standard of what direct or circumstantial evidence will surmount the intent standard. 1) the effect or impact of the official action 2) the historical background of the particular case 3) the chronology of events leading to the decision 4) any departures from normal procedures in decision making 5) any departure from normal substantive criteria used in such decisions 6) the legislative or administrative history of the decision. cf. Hill *Environmental Justice: Legal Theory and Practice*, p. 245

[102] Others have worked very hard on this issue. Of note to environmental justice specifi-

one be so inclined, there is much work done, both within the context of the U.S. as well as opportunities for comparative law. British law, for instance, protects against both direct and indirect racism, including the these situations which concerned advocates so fiercely in the U.S. where facially neutral action disadvantages a minority group.[103] In this research, however, the intent/impact background is necessary for the reader to understand more fully the outcomes when looking at how the civil rights path failed to generate derived environmental protections.

Humanity has never efficiently solved problems when the needs of the one are in contrast to the good of the many. It seems ubiquitous that the satisfaction of the One and the Many, the individual and society, while joined in the coarse motions as seen from a distance, are extremely turbulent and in opposition at micro levels. As such, it stands to reason that, absent complex rules and legal structures, it is simpler to leave control of the situation in the hands of an agency; simply because the agency can go either way—choosing for the good of the One *or* the Many. The open question is then to make sure the agency both truly *can* and truly *does*, a far easier task than spelling out, ex

cally, Lambert makes the case that decisions under intent standards were not only correct legally, but also made in the right direction for environmental justice. In moving the focus of lawyers away from courtroom tactics for bringing private suits, one can move backwards into the realm of theory and address the more root causes of environmental justice. That is, in the advocacy-focus of the U.S. intent standards are not only defensible but beneficial to steering advocates away from this path. Private action suits address merely the symptoms. Instead of empowering citizens to fight disparate impacts, allow instead federal agencies to become "screeners" of decisions, allowing them to determine which disparity causing impacts are dysfunctional. See Lambert, p. 1161. For a practical example too, note that The National Black Chamber of Commerce filed amicus briefs during the *Chester Residents* proceedings (Section 5.3.2.3) asking the courts *not* to allow disparate impact suits against environmental disparity due to their concerns on the negative effects such suits would have on brownfield re-development which would be beneficial to urban environments. An example of just such an asymmetry exists in the environmental justice case of *New York City Environmental Justice Alliance v. Giuliani*, 50 F. Supp. 2d 250, (S.D.N.Y. 1999). In this case, the city of New York had plans to build low-income housing on city-owned property. The property, however, was currently in use by minority individuals as community gardens. Those wishing to protect the gardens sought a preliminary injunction to stop the defendant from selling their property to the developers of the new low-income housing. They sued on the grounds that the action would create a disparate impact on the minority area. The court not only denied plaintiffs' motion, but also denied that a private right of action existed for such an action. Outside of the issue of standing, the case would have precluded the much-needed low-income housing in favor of minority gardens. Clearly to the plaintiffs, the availability of gardens and outdoor space in New York City is extremely important. To society as a whole, however, the low-income housing would have more wide-spread effects. There is no unambiguously correct answer here.

[103]Geddes, Andrew/Guiraudon, Virginie Britain, France, and EU Anti-discrimination Policy: The Emergence of an EU Policy Paradigm. *West European Politics*, 27 2004, p. 338.

ante, what is and is not *justifiable* disparate impact.[104] In that way, the EPC and the Constitution play a framing role in anti-discrimination protections in the U.S., and by extension play the framing role in the potential for derived environmental protections. The inability to be too flexible at this high level though pushes more tuned measures downward into legislation and regulation, matters to which the following sections turn.

5.3 Protections Derived from the Civil Rights Acts

For a multitude of reasons, The Equal Protection Clause then does not provide much, if any, derived environmental protections. Its place in the Constitution virtually assures a tight interpretation, and in practice this has been the case. Even when there is an opportunity to utilize the protections against discrimination in an environmental manner, the clause's power is otherwise obscured by the hurdle or proving intent. Problems with intent continue down the line of civil rights protection too, placing barriers on access to other statutes meant to prevent discrimination in situations where the EPC proved less than fully effective. The first are the broad protections of the Civil Rights Act of 1964, especially §601 and §602. These two sections have figured prominently in the environmental justice discussion in the U.S., especially recently. The second is Section 1983 of the Civil Rights Act of 1871 (§1983).[105] The preceding discussion on the EPC and its reliance on the doctrine of intent is heavily utilized here and the conclusions for derived-EHR protections is the same.

5.3.1 The Civil Rights Act of 1964

The Civil Rights Act of 1964 was a landmark addition to the U.S. legal landscape.[106] Although there is much to discusstThe next few paragraphs focus tightly on the aspects of the Act which have proven critical to cases of environmental justice. Much of the discussion revolves around the doctrine of intent.

[104] Lambert, p. 1194, illustrating that the attempt was made with Title VII employment cases. See discussion below, and, e.g., Lye, Linda Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense. *Berkeley J. Empl. & Lab. L.* 19 1998.

[105] 42 U.S.C. §1983 : US Code - Section 1983: Civil action for deprivation of rights. Also known as the "Ku Klux Klan Act" due to its role in protecting southern blacks from racial abuses propagated by the Klan.

[106] An *Act* of Congress in the U.S. is a statute which legislates how powers of the Constitution are used.

Again, the standard by which to measure discrimination is not written explicitly in the legislation of the United States. That is not to say that Congress was or is unaware of the difference between a discriminatory intent standard and discriminatory effects when crafting the Act. In fact, and specific to the Civil Rights Acts, the House of Representatives turned down an amendment in 1966 to explicitly word Title VI of the 1964 Civil Rights Act to require proof of intentional discrimination.[107] In the absence of guiding legislation the courts have collectively determined that the Acts, similar and lying in the shadow of the EPC, are meant to proscribe only intentional discrimination. The story continues here, however, as there is still the possibility of states and agencies extending protection farther, to discriminatory effects, on their own. The extension of protections above and beyond the framing mandate is generally permissible, but there are problems with this legal construction, and its application to derived EHR.

In this vein, this section lays out the broad outlines of the applicability of sections of the Civil Rights Acts—predominantly §601 and §602 of the 1964 Act, §1983 of the 1871 Act, and Title VIII (The Fair Housing Act) of the 1968 Act. The section then delves rather deeply into what may appear esoteric relative to the larger outlined structure of the preceding chapter. One cannot glaze over details here because of a recent Supreme Court case—*Alexander v. Sandoval*—which severely curtails the usability of civil rights pathways for environmental justice advocates and forms the basis of all that blocks using civil rights pathways for environmental protection. Although the case in question was not about pollution, it removed the private right of action on the major pathways which environmental justice advocates had employed since the 1979 *Bean* case brought the idea of tying civil rights protection to environmental issues. Although the discussion here merely presents the information and does not make a judgement on it the removal of something as basic as legal standing reveals how limited existing civil rights law is at addressing environmental justice and also how prone the derived-EHR pathway is to barriers in the U.S. The extent to which broad concepts of equal protection and civil rights can trickle down to protecting the environments is thus limited by these subtleties of U.S. jurisprudence. Therefore, the topics that case brings

[107] 112 Cong. Rec. H18,715 (1966). cf. Hoffer, Melissa A. Closing the Door on Private Enforcement of Title VI and EPA's Discriminatory Effects Regulations: Strategies for Environmental Justice Stakeholders After Sandoval and Gonzago. *New Eng. L. Rev.* 38 2004, p. 997.

together show clearly why the hope of deriving environmental protections via existing fundamental protections is rather small.

5.3.2 Title VI

Title VI of the Civil Rights Act of 1964, more commonly referred to simply as Title VI, prohibits discrimination on the basis of race, color, or national origin in programs receiving federal funding.[108] This construction of Title VI has it operating through the funding agencies of the government receive. Operating in this fashion means that the Act itself does not bind the federal structure; the federal government is not able to be named in a dispute on Title VI. Rather, the states and recipients of the federal funds will be responsible for failing to secure anti-discriminatory duties. Due to the federalist nature of the United States, the tying of civil rights into the pockets of states and agencies whose largest funding source is the federal government is a strong incentive toward pushing, albeit slowly, all forms of discrimination out of U.S. society.

Up until the 2001 decision in *Alexander v. Sandoval*,[109] this was the strongest possibility for deriving environmental justice protections in the U.S. rights-based discussions. If an agency made an environmental usage decision which could be argued to discriminate, the agency's decisions were technically in question. This included any agency, from educational facilities receiving federal funding, municipal planning obtaining government matching funds, and of course the EPA. There is much more subtlety however given the two workhorse sections of Title VI, §601 and §602. §601 first sets large boundaries of protection, preventing any person from being "excluded from participation in, be denied the benefits of, or be subjected to discrimination" by the cornucopia of state and local agencies which draw any sort of federal funding.[110] It is the equal protection clause writ small, around the well of federal funding. §602 directs federal agencies to promulgate regulations to effectuate §601.[111] Agen-

[108] 42 U.S.C. §2000d (1988).

[109] 532 U.S. 275 (2001).

[110] "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[111] "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is

cies thus receive some grant of power via congressional mandate to make sure that the funding they receive from the government does not end up benefiting discriminatory ends. The following sections explore each section in more detail.

5.3.2.1 Section 601

Naming §601 the EPC writ small carriers more than a title; §601's coverage over the non-discriminatory application of funding across agencies receiving federal funds has the same shortcomings as the EPC. Despite never being decided strictly on its own merits, the U.S. Court held that §601 proscribes only intentional discrimination[112] deciding that it is coextensive with the constitutional protection. There is clear evidence though for standing on §601.[113]

Recall that *standing* is whether the court sees the litigant as entitled to bring judicial action against another party and have the court decide the case on its merits.[114] Standing can be seen as the ability of a party to connect themselves to a harm caused to them via existing laws. In this sense, §601 allows for private standing—that is, to ordinary persons—to bring a legal case against an agency, who receives federal funding, and who discriminates when one is directly connected to the harm being done. The Courts recognize that the harm caused by the agency is born by the private citizen and therefore is actionable by them. Therefore §601 provides a lower-level equal protection clause to assure federal funds are distributed equitably, a protection that is enforceable by citizens.

Despite having to prove discriminatory intent, as plaintiffs would under EPC litigation, and therefore having the same drawbacks for all forms of protection, having standing is quite important. §601's sibling, §602 no longer admits to standing. The Supreme Court recently held that litigants cannot enter court

taken."

[112] *Guardians Assn. v. Civil Serv. Comm'n of New York City*, 463 U.S. 582 (1983). . See also Mank, Bradford C.; Gerrard, Michael B., editor Chap. Executive Order 12,989 In The Law of Environmental Justice. American Bar Association, 1999, p. 23, 31. Also *Regents of the University of California v. Bakke*, 438 U.S. 582, 584 (1983) (*Bakke*) viewing Title VI as coextensive with the Equal Protection Clause and hence requires proof of intent.

[113] *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), holding that there is a private right of action under Section 901(a) of Title IX of the 1972 Education Amendments Act, which is modeled on Title VI §601. The text of §601 as well as the legislative history was used in deciding the case. cf. Idem Chap. Title VI In The Law of Environmental Justice. American Bar Association, 1999, p. 32

[114] *Warth v. Seldin*, 422 U.S. 490 (1975).

proceedings claiming private harm from violations of regulations promulgated under §602. Recall that §602 is the congressional mandate to agencies receiving its funds to make rules assuring that §601's goals are met. Hence, there is now *no* standing for private litigants on §602.[115] Like the discussion on intent versus impact, the discussion on standing carries much of the substance of the strengths and weaknesses of Civil Rights laws in extending protection to environments. Johnson[116] notes that the U.S. Supreme Court has tightened standing requirements for direct environmental litigation as well.[117] The tightening has not been as severe though as with the standing for suits on civil rights issues.[118]

§602 was once a great hope for environmental justice advocates in the U.S. who saw an opportunity to strike at the many federal agencies for making decisions which continued to effectuate environmental injustice. Several agencies had promulgated rules to put §601 goals into effect that carried their own discriminatory impact standard, a higher requirement than the framing mandate required. If an agency, like the EPA, had promulgated §602 rules saying that no decisions could have discriminatory impacts, then citizens could bring a complaint that the agency had violated their own §602 promises. From the discussion of the *Bean* case,[119] which jump started the environmental justice movement's motion into legal forums, this legal construction makes much sense.

5.3.2.2 Section 602

Section 602 directs federal agencies to promulgate regulations to ensure that organizations receiving federal funds indeed enact their spending equitably.[120]. The EPA, as a notable example, adopted language pursuant to §602 which prohibits program criteria and from locating facilities where there will be a discriminatory *effect*.[121] Specifically, §7.35b states that recipients

[115] *Alexander v. Sandoval*, 532 U.S. 275 (2001), hereafter *Sandoval*

[116] Johnson, Stephen M. Economics v. Equity II: The European Experience. *Washington & Lee Law Review*, 58 2001, p. 465, n. 287

[117] E.g. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 109 (1998) (denying standing to an environmental group).

[118] E.g. *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.,* 528 U.S. 167, 180-88 (2000); *FEC v. Atkins*, 524 U.S. 11, 26 (1998); *Bennett v. Spear*, 520 U.S. 154, 178-79 (1997); all showing examples of affirmation of standing in environmental suits.

[119] 482 F. Supp. 673; 1979.

[120] Hill, Barry E. Lemons Into Lemonade. *Envtl. F.* 5 2002, p. 33.

[121] 40 C.F.R §7.35(b,c) (emphasis added).

> "shall not use criteria or methods of administering its program which have the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this part applies on the grounds of race, color, or national origin or sex; or with the purpose of effecting or defeating or substantially impairing the accomplishment of the objectives of this subpart."[122]

As another example, the Department of Justice, in clarifying how agencies should view their responsibility under §602, says that they may not "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.[123] The key word in all of these directions is *effect*. The agencies themselves, in their dedicated power from Congress, make stronger regulations relying on an effect standard rather than an intention standard in order to give effect to the anti-discrimination provision.

Note however that there is no federal requirement for an agency to go above and beyond their §601 mandate. Therefore the need to give effective meaning to §601 is the lower bound, a bound which we know is augmented by an ability to infer from a pattern of effects discriminatory intent. Despite the lack of a requirement to protect against disparate impacts, since §602's enactment all federal agencies have codified the discriminatory effects language into their laws. Hence, all agencies have bound themselves to make more stringent judgments on the outcome of their regulations than required by the intent-based terminology in §601.[124]

Despite the willingness to promulgate regulations above the lower bound of intent, §602 was not a panacea for environmental justice litigants. There are two legal pitfalls surrounding §602 which we will address here. The first is the as-yet theoretical question of whether agencies have the power to propagate disparate impact regulations over §601's mandate of preventing only intentional discrimination. That is, while agencies can go above the standards needed to make §601 effective, do they have the mandate to change the stan-

[122] 40 C.F.R. §7.35(b)

[123] cf. La Londe, Kyle W. Who Wants to Be an Environmental Justice Advocate: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander v. Sandoval. *B.C. Envtl. L. Rev.* 31 2004, p. 32

[124] Hill *Envtl. F. 5 [2002]*, p. 39 The agencies are not however controlled by §602; they are making a judgment to promulgate rules in accordance with that part of Title VI.

dard of measurement of discrimination from intent to effects? Congress can delegate some power to agencies, but agencies can not exceed their congressional mandate in making rules and regulations. This would naturally be a relevant place for discussion were the research here aiming to propose an expansion toward effects-standards. The next section discusses this question as a lead in question to *Sandoval* but does not pass its own judgment. After all, if the question was answered in the affirmative, the use of Title VI for derived-EHR would still hit upon all the hurdles discussed below; if it was answered in the negative it would be yet another potential roadblock that only strengthens the hypothesis here. Therefore, the discussion focuses here on the problem of standing in Title VI; is §602 an avenue for private plaintiffs or was it intended for agencies only?

5.3.2.3 Agency Power and §602

It is still legally unclear as to whether agencies indeed have a right to extend their own regulations to cover disparate impacts, in light of the fact that §601 covers only intentional discrimination. Such a claim came to forward as part of the case *Chester Residents Concerned for Quality Living v. Seif* (Chester Residents).[125].

Chester Residents challenged the Pennsylvania Department of Environmental Protection (PADEP) for their issuance of new permits for a waste facility in the pollution-heavy, and minority populated, county of Chester. The permit would be the fifth sited hazardous waste site[126] Although a lower court agreed that the permitting process had a discriminatory effect they saw no private standing to bring the case under §602 and requested that the citizens amend their complaint to draw only upon §601 of Title VI. This would, however, leave them to prove discriminatory intent in issuing the permits rather than simply showing the discrimintory effect and linking it to the agencies own regulations. As the case climbed the U.S. court ladder it was posed to be the first test of the right to standing question.[127] The progression of denial, appeal, and re-

[125] 132 F.2d 925, *vacated* 119 S. Ct. 22 (1998)

[126] Lambert, p. 1155; the litigation was also notably playing in the same physical areal *and* the legal milieu as the Khian Sea waste-trafficking incident. *See* Pellow, David Naguib *Resisting Global Toxics*. The MIT Press, 2007, p. 116

[127] For a full chronology, see Worsham, Julia B. Latham Disparate Impact Lawsuits Under Title VI, Section 602: Can A Legal Tool Build Environmental Justice? *B.C. Envtl. Aff. L. Rev*, 27 2000, p. 666-679

versal involved is revealing of the level of ambiguity and ongoing difficulty in operationalizing the complete desegregation of all circumstances under the law in the United States. It is also another indication of the difficult road toward derived-EHR there.

The situation was anything but clear. Two previous cases had intoned in dicta that agencies could promulgate regulations with greater anti-discriminatory bars than the original mandate.[128] An amicus brief filed by the Washington Legal Foundation though pointed out that the were indeed purely dicta.[129] Three justices in the *Guardians* court stated that §602 extensions toward disparate impact metrics fall under proper agency discretion while two other justices were of the opinion that §601 itself covered disparate impacts, and not merely intentional discrimination. Hence, the commentary indeed showed that a majority of the court believed §602 extensions to be valid.[130] The logic was not part of the holding of either case, however. Nevertheless, and as a counterpoint, the *Sandoval* decision pointed to Justice O'Conner's language in *Guardians* that disparate impact regimes "go well beyond" the purpose of Title VI.[131] The amicus brief though points out the undecided legal nature of the EPA's *effects* wording

Above problems with clearly interpreting judgments, there are underlying administrative law problems as well. If an agency can overstep their §601 commitments and enact disparate impact regulations, and assuming inarguendo that they can, the question emerges as to whether an agency's regulation is itself a law. Specifically, does their regulation carry the force of law? The *Chrysler* test[132] established a three point test for whether a regulation indeed carries the force of law.[133] Should a regulation pass the test, it is then considered to carry the force of law. Indeed, the question of whether rule-making

[128] *Guardians Assn. v. Civil Serv. Comm'n of New York City*, 463 U.S. 582 (1983); *Alexander v. Choate*, 469 U.S. 287 (1985).

[129] Mank *The Law of Environmental Justice*, p. 34.

[130] Ursic, Joseph Finding a Remedy for Environmental Justice: Using 42 U.S.C. 1983 to Fill in a Title VI Gap. *Case W. Res. L. Rev.* 53 2003

[131] *Guardians* at 613. Discussion in Laufer, John Arthur Alexander v. Sandoval and Its Implications for Disparate Impact Regimes. *Colum. L. Rev.* 102 2002, p. 1657

[132] See *Chrysler v. Brown*, 441 U.S. 281 (1979)

[133] Namely

1. Do the regulation function as rules which affect individual rights and obligations as laws do?
2. Had Congress granted authority for the agency to make regulations doing so? and
3. Did the creating of the regulations follow correct procedural requirements?

can, in effect, be legislative was answered in the affirmative.[134] The point is simply that regulations do not automatically carry the force of laws in U.S. administrative law.

As laws can only be created by Congress, the regulation-as-law originating from the agency must fit within the original law as passed by Congress. Hence, the power an agency wields stems *only* from the Congressional statutes authorizing their actions. Debates are inevitable over what an agency does and what Congress "meant" for them to do. If an agency creates a regulation, a mechanism which can carry the force of a law, the Courts may step in to clarify the grey area between Congressional intent and agency effectuation. This brings us back to one of the questions of this section: do agencies—in general, or the EPA, specifically—have the authority to promulgate disparate impact regulations? If one views agencies as a sort of limited-power legislative body located much closer to problems than the Congress proper, then one finds much traction in allowing the agency leeway to regulate as they see fit. Otherwise, it would seem prudent for the courts to keep an eye on the balance of power between congressional statutes and agency regulations; agencies creating laws where they have no democratically-granted ability to do so is counter to the rule of law. The prime arguments for and against judicial management of agency regulations are enunciated in *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.* (*Chevron*).[135]

Chevron is one of two precedents the Supreme Court established which help courts decide whether there is, in fact, a grey area needing clarification around an agency regulation. Courts can afford what is termed as *Chevron Deference* to agency interpretation when a statute does carry the force of law.[136] The courts defer to the reasonable agency interpretation of congressional mandate when such deference is warranted. Under *Chevron* deference, courts acknowledge the quasi-legislative nature of the power often delegated to agencies and allow them to promulgate laws—regulations having the force of law—of their own accord.[137] The court's job is only to determine whether the statute in question is ambiguous and if Congress meant for that ambiguity to be ad-

[134] See *INS v. Chadha*, 462 U.S. 919 (1983) and Davant IV, Charles Sorcerer or Sorcerer's Apprentice: Federal Agencies and the Creation of Individual Rights. *Wis. L. Rev*, 2003 2003, p. 641

[135] 467 U.S. 837 (1984)

[136] For a similar idea in the UK, see Wednesbury unreasonableness, *Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 223* ff

[137] Mank *Fla. St. U. L. 32 [2005]*, p. 872.

dressed by the agency.[138]

To be clear, *Chevron* deference is often viewed as strong deference as the courts step out of the way of the agency.[139] There is a lower bound for deferring to agencies' will in constructing congressional mandates. *Skidmore* deference occurs where, in light of a regulation not having the force of law[140] but rather and merely the power to persuade, the court analyzes the regulation with less deference, a level predicated on the persuasive power.[141] Naturally, agencies will argue for *Chevron* deference when faced with a lawsuit while plaintiff's will petition for *Skidmore* deference, hoping for the judicial oversight it brings.[142] Despite multiple chances, the Supreme Court remains quite timid in drawing brighter lines than *Chevron* and *Skidmore* as to when and where agencies approach the borders of their congressionally-granted powers.

There are those who would argue that *Chevron* was overlooked or downplayed in recent proceedings over §602 regulation, and that *Chevron* deference should be applied or called for in such situations,[143]. Other have however noted that statutory silence should not be inferred to reflect congressional intent to delegate authority.[144] Still others make the point that agencies are constrained, both by Congress and by judicial precedent, to effect only regulations co-extensive with the Fourteenth Amendment.[145] In light of the unsettled issue, the safe way to view *Chevron* deference is to limit it "to regulations that merely interpret a statutory right and do not apply to regulations that cre-

[138]Lambert, p. 1217.

[139]Although recent cases have narrowed its strong interpretation. See *United States v. Mead Corp.*, 533 U.S. 218 (2001). Also *Alaska Department of Environmental Protection v. EPA*, 540 U.S. 461 (2004)

[140]For instance, in a case of a regulation not passing the Blessing test

[141]The court looks at "factors which give [the regulation] the power to persuade, if lacking the power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)

[142]Johnston, Craig N./Funk, William F./Flatt, Victor B. *Legal Protection of the Environment*. Thomson West, 2005, p. 80.

[143]Galalis, David J. Environmental Justice and Title VI in the Wake of Alexander v. Sandoval: Disparate-Impact Regulations Still Valid Under Chevron. *B.C. Envt. Aff. L. R.* 31 2004 stating that as the enacting Congress did not explicitly address whether discrimination is to be weighed as an intent or a effect, then the *Sandoval* Court is bound to defer to the EPA by *Chevron*, echoing Justice Steven's dissent, 502 U.S. at 309 (Stevens, J., dissenting). Also note Gorod, Brianne J. The Sorcerer's Apprentice: Sandoval, Chevron, and Agency Power to Define Private Rights of Action. *Yale L. J.* 113 2004, and Hoffer, p. 997. Justice Scalia refused to defer because the "the Court had construed Title VI to ban only intentional discrimination." cf. Mank *Fla. St. U. L. 32 [2005]*, p. 848

[144]Ibid., p. 873.

[145]Lambert, p. 1217, commenting that *Bakke's* holding leaves no ambiguity on what types of agency regulations are permissible.

ate or 'effectuate' rights based on the general goals of a statute."[146] Notably, the Supreme Court advises courts to be at their most deferential in situations where the agency must make difficult predictions—"at the frontiers of science"—about future conditions stemming from current actions, interpreting and effectuate their congressional statutes in the shadow of such uncertainty.[147]

This open question as to how much power regulatory agencies have and what shape that power can take is a major gap the Title VI jurisprudence.[148] As §601 does not explicitly state that it proscribes only intentional discrimination but has been inferred as such from its perceived standing as coextensive with the EPC[149] it would appear that there are grounds for "wiggle room" for agencies to promulgate regulations under §602 to effectuate the goals put forth in §601 goals which are not explicitly limited to preventing intentional discrimination.[150] That wiggle room though can foreseeably shrink depending on the circumstances.

Despite the lack of both binding judicial precedent and adequate clarity on when agency discretion is permissible, some precedent for the validity of an agency's ability to extend Congressional legislation—the wiggle room—in situations where Congress intended the agency to prevent certain behaviors can be found in the regulations promulgated by another federal agency: the Securities and Exchange Commission (SEC). In *Ernst and Ernst v. Hochfelder*[151] the Court held tightly to congressional wording in an empowering statute. The clarification by the court was that "a private plaintiff may not maintain a... suit under... [a statute when] the statute authorizing the rule... does not prohibit a class of behavior broad enough to encompass those acts."[152] Plainly stated, the lawsuit at hand was invalid because they were stretching a

[146] Mank *Fla. St. U. L. 32 [2005]*, p. 873-4. See also Gorod.

[147] *Baltimore Gas & Electric Co. v. NRDC, Inc.*, 462 U.S. 87, 103 (1983); and *NRDC, Inc v. EPA*, 902 F.2d 962 (D.C. Circuit, 1990). cf. Johnston/Funk/Flatt, p. 334.

[148] see Note After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement. *Harv. L. Rev.* 116 2003, p. 1781 citing that the U.S. Court missed another opportunity to address this matter directly in *South Camden Residents v. NJDEP* (discussed at Section 5.3.3.1)

[149] "... when the charge is intentional discrimination in the nature of the government preference, Title VI incorporates the constitutional standard..." *NAACP v. Medical Center Inc.*, 657 F.2d 1322, 1330 (3rd Cir. 1981).

[150] Compare Primus, Richard A. Equal Protection and Disparate Impact: Round Three. *Harvard Law Review*, 117 2003, Nr. 2; discussing whether equal protection affirmatively blocks the use of disparate impact standards within legislation.

[151] 25 U.S. 185 (1976)

[152] Ursic, p. 510. Also *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) See also Mank *Fla. St. U. L. 32 [2005]*, p. 870-71, Lambert, p. 1213.

regulation to cover behavior they perceived to be illegal but was not deemed problematic by the original authorizing statute. Extending the protection is something only Congress can do, not the agency.

The holding established clearly that agencies were merely administrative, and not legislative bodies.[153] The Court believed that because the statute went to lengths to explicitly enunciate what behaviors were wrong the intent was to preclude only those behaviors. The reverse image of this logic is then that a statute will be less specific in its definitions if it indeed authorizes a broader agency mandate. One might go so far as to say that such logic would preclude any stretching of civil rights toward new ends, but that would be too much. First, the case here dealt with statutes with extensive congressional input as to right and wrong; sections 601 and 602 are much more open in their text. Also, there would not necessarily be a widening of discrimination statutes to encompass environmental justice (and EHR) concerns. Furthermore, The U.S. Court did touch on the question of when agencies may broaden their mandate in *United States v. O'Hagan*.[154] The Court found that the statute in question did allow for greater agency discretion because it was worded in preventative terms instead of proscribing certain actions. Congress authorized the agency to *prevent* certain outcomes here, but did not tightly specify the illegal practices. This was thus a legislative action deemed a clear (and apparently kosher)[155]) delegation of authority to the agency. If Congress had merely stated which practices were illegal that would not be viewed as carte blanche to promulgate an agency's own version preventative regulation.

Therefore, when a congressional authorizing statute is couched as a prophylactic measure it necessarily circumscribes a larger area of activity than core activity which Congress explicitly is controlling.[156]. The agency must carefully craft its wording to make sure the regulation is merely "gap-filling" what is missing in the statute's text.[157] Agencies, even when they are allowed to broaden within their mandate, must remain bounded in their pursuits. Further there is little guidance other than the fact that the U.S. abhors overly broad provisions. Tractability and ends-justifying-means seem to be good rules of

[153]Lambert, p. 1211.
[154]521 U.S. 642 (1997).
[155]Delegation of authority from Congress to agencies has its own extensive jurisprudence. See, inter alia, Schwartz, Bernard/Corrada, Roberto/Brown Jr, J. Robert *Administrative Law: A Casebook*. Aspen Publishers, 2006
[156]Ursic, p. 510.
[157]Lambert, p. 1215.

thumb to keep in mind, especially relative to the ECHR.[158] Suffice it to say that even when agencies give broader effect to anti-discrimination statues, it is far from clear that anyone concerned with environmental justice could use that as a toehold toward enforcing a right.

5.3.2.4 Private Right of Action and §602

Whether or not it is a legitimate exercise of agency power to proscribe discriminatory impacts, the problem still remains as to whether private citizens were deputized by Congress to enforce §602 regulations. In theory, a violation of a federal statute is akin to negligence and Congress could be viewed as allowing a private plaintiff to sue federal law violators for failure to take reasonable care.[159] As the above cases were not the first times such questions were raised, the U.S. Court has a general test for examining questions of when citizens are ready to serve as policers.

The *Cort* test[160] determines whether there is an implied private right of action from a statute. The question becomes one of whether the statute grants a right to a citizen to ask for the codified duty to be performed. Forcing the hand of an agency is in general a difficult proposition under US administrative law, thanks in part to doctrines like prosecutorial discretion. The Cort test is thus not a binding test of whether a private right of action exists. It addresses where a private right might plausibly reside.[161] Given such criteria, the courts had previously upheld—at least implicitly—a private right of action under §602.[162]

[158] *Romer v. Evans* 517 U.S. 620 (1996), where the Supreme Court struck down a provision which would have barred special protection of people based on sexual orientation. In the Court's view, the ends aimed for were much narrower than this broad means employed.

[159] Lambert, p. 1227.

[160] From *Cort v. Ash*, 422 U.S. 66 (1975)

[161] The *Cort* test asks

1. Does the statute intend to provide special benefits to the plaintiff?
2. Is there implicit or explicit evidence that Congress intended to create or deny this remedy?
3. Is such a remedy consistent with the underlying purposes of the legislative scheme?
4. Is the cause of action traditionally relegated to state law, and in an area where a federal cause of action would intrude on important state concerns?

Mank *The Law of Environmental Justice*. See also, for relevant discussion Lambert, p. 1229-31.

[162] esp. *Guardians*, holding a private right of action for minority police officers experiencing discrimination through test-based hiring, seniority, and firing policies. Such was noted by the Third Circuit in *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d

Most notably, the Third Circuit Court upheld a private right under §602 in their holding on *Chester Residents* before the Supreme Court vacated their judgement as the situation went moot before their certiorari hearing.[163] Nevertheless, in *Chester Residents*, the Third Circuit found that the regulation promulgated pursuant to §602 indeed warranted a private right of enforcement. The lower court found that the regulations satisfied a three-prong test, similar in structure to the broader *Cort* test.[164]

The result was tentatively beneficial for the goal of extending civil rights protections to environmental problems as the *Chester Residents* case explicitly involved environmental concerns of a minority group. A final decision on the existence of a private right though was postponed in *Chester Residents* until *Sandoval*.[165] The outcome though fell more into line with §601 and the EPC than toward deriving environmental justice protections.

5.3.2.5 Alexander v. Sandoval

The grey areas surrounding the interpretation of §602 came to a head in *Alexander v. Sandoval*[166] after missing a chance with *Chester Residents*. Although §601 grants a private right of action, it rarely found application in environmental justice contexts due to the high hurdle played by the intent

925, 927 (1997); also *Alexander v. Choate*, 469 U.S. 287, upholding a lower court granting standing for the disproportionate impact case, but reversing the finding of discrimination because there was no intention. Furthermore, see *Villanueva v. Carere*, 85 F.3d 481 (1996), and *David K. v. Lane*, 839 F.2d 1265 (1988) cf. Ursic

[163]524 U.S. 974. The act of vacating the opinion would appear warranted in the face of pointed criticism that the validity of disparate impact claims stems from dicta improperly becoming holding. See discussion in Lambert, p. 1204-1211; showing how stricter adherence to the dictum that "the holding of the Court may be viewed as that position by those members who concurred in the judgements on the narrowest grounds", which stems from *Marks v. United States*, 430 U.S. 188, 193 (1977), would have kept the *Alexander v. Choate* court from creating a false holding out of the *Guardians* opinions.

[164]132 F.3d 925 The test here affirmatively answered the following similar questions

1. Is the agency rule properly within the scope of the enabling statute?
2. Is the statute under which the rule was promulgated properly permits the implication of a private right of action?
3. Will implying a private right of action further the purpose of the enabling statute?

[165]There was concern at the activist level whether taking the *Chester* case to the Supreme Court would be a good decision for the movement. The likelihood of failure, that is, overturning the Circuit Court's opinion, is statistically high. A negative judgement would have been crushing to environmental justice concerns. While the national attention from the case itself might bring benefits, there were reasons for environmental justice organizers to hope for more lower court cases similar to *Chester* before pressing the issue to the Supreme Court.

[166]532 U.S. 275 (2001) hereinafter, *Sandoval*

standard. That left its sibling, §602, to provide the leverage for a citizen wishing to bring a discriminatory suit based on agency-created regulations stained with discriminatory effect. Assuming, in arguendo as *Sandoval* did, that impact regulations are a valid exercise of a funded agencies' power, the question of whether a private citizen has standing to bring suit boils down to whether there is to be private oversight of agency regulations or whether they are only subject to internal oversight.

The *Sandoval* case came to the Supreme Court in the aftermath of *Chester Residents*. Unfortunately for the environmental justice community, the *Chester* case was ruled moot as the permitting authority eventually revoked their request for an extension of permitting process because the applicant was delinquent on associated bond payments.[167] The Supreme Court, who had accepted a petition for a writ of certiorari, then vacated the Third Circuit Court's earlier decision that standing was implied under §602, and remanded the case for dismissal. The unfortunate side of this turn of events was not only that the question was left undecided after it had reached all the way to the Supreme Court, but that the issue fell into another case, one not stemming from environmental concerns, for a decision.

The *Sandoval* case involved a dispute over a decision by the state of Alabama's Department of Public Safety to give drivers license tests only in English.[168] The non-English speaking citizens in that state brought a class action suit using §602 alleging that the Department of Justice's regulations—an english-only test— would have a discriminatory effect which would violate the agency's—the Department of Justice—own anti-discrimination creed.[169] The outcome of *Sandoval*, in addition to answering the question of private standing on §602 in the negative, abruptly changed the road map with which environmental justice advocates used to navigate. Suddenly, private citizens had no standing to directly compel compliance with §602 of Title VI despite nearly thirty years of precedent to the contrary and the finding of the Third Circuit

[167] Worsham, p. 676.

[168] Although the focus here is the outcome's effect on standing of U.S. citizens to utilize §602, the linguistic aspects of the case call to mind both the earlier U.S. case *Meyer v. Nebraska*, 262 U.S. 390 (1923) and the ECtHR *Belgian Linguistic Case*, 23 July 1968, 1 E.H.R.R. 252.

[169] It is unfortunate for environmental justice advocates that the issue was decided on a canvas much different than the environmental one of *Chester*. One is left to wonder whether the public safety undertones of an environmental action would have made the private enforcement issue under §602 a more volatile issue.

Court's earlier, but vacated, *Chester Residents* test.[170] In fact, it overturned the previously implied logic holding that the wording of §602 passes their logical tests for implying private cause of action.

Specifically, Justice Scalia, writing for the slim majority, found that the explicit wording of §602 focused entirely on what agencies should do and no where did Congress mention individuals at all, let alone what their part should be.

> "Section 602 focuses on federal agencies' obligations, rather than on individual rights. Moreover, [it] establishes a fairly elaborate scheme for enforcement, which 'suggests that Congress intended to preclude other means of enforcement'..."[171]

The very tight reading of the authorizing statute gave the judges cause to consider, and ultimately rule against, whether §602 implied private rights of action through the *Cort* criteria.[172] Harkening back to principles, the basics of statute construction imply that when a statute specifies a certain method for carrying out a legislative mandate it simultaneously implies that it should not be accomplished in any other sense.[173] The focus then on federal agencies' obligations implies, if not confirms, that Congress excluded obligations on citizens.

Nevertheless the U.S. Court's ruling was only 5-4, a slim majority, with a stinging dissent written by Justice Stevens.[174] The Court found that Congress had not explicitly written or intended for private citizens to bring discriminatory cases via this route, and rather only other government agencies had

[170] La Londe, p. 34.

[171] Hill *Envtl. F. 5 [2002]*, p. 40. Also Lambert, p. 1250; claiming Congress must have known they would be foreclosing a private remedy by creating the remedies for violations of §602 in 1964.

[172] The circuit court had originally inferred that the amendments applied to Title VI through the Rehabilitation Act of 1986, codified at 42 U.S.C. §§2000d-7; "In a suit against a State for a violation of a statute referred to in paragraph (1) [inc. title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq.], remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State." The Supreme Court viewed that the amendments only clarified §601 obligations, and hence could not be applied to answering the *Cort* criteria. Ursic. Note also that comments toward implying private rights of action contained in and around the Restoration Act of 1987 also do conclusively grant private rights of standing for disparate impact suites. See Lambert, p. 1239-1242

[173] *expressio unius est exlusio alterius* (the mention of one thing implies the exclusion of another). Ibid., p. 1238-9 and notes therein

[174] The dissent by Stevens goes so far as to call the majority's line of reason "something of a sport." 532 U.S. 275 at 300.

congressionally–created standing. Plaintiffs might still lodge an administrative complaint for non-compliance with regulations but there is no standing for them to sue directly.[175] The dissent added that although the Court's odd ruling foreclosed §602 routes for private suits, a plaintiff could still quite simply claim that this and other discriminatory effect issues were in violation of §1983—an idea to which we turn now. The plaintiff might not be able to sue directly about a §602 violation, and may not have evidence of discriminatory intent in agency funding decisions necessary to succeed on a §601 claim, but they could stand on §1983 and contend that agency failure to comply with their §602 regulations violates a right guaranteed to them. Rights guaranteed but not received are actionable under §1983 but brings the plaintiffs back in to the question of when regulations promulgated under delegated authority become rights under the law.

Although *Sandoval* closed private standing to enforce §602 regulations it left open the question of whether discriminatory effect standards promulgated by agencies were a proper use of their power under Title VI. In light of the closing of the §602 pathway to private litigants, however, the debate as to whether disparate impact regulations are valid is nearly moot from the perspective of deriving environmental protections from rights already granted. While the EPA and other agencies should find the most effective internal procedure for handling administrative complaints of non-compliance—a remaining albeit rather passive approach to private oversight of §602—the big picture of environmental justice and derived environmental protections in the U.S. moves quickly away from anti-discrimination applications. But while the closing of private standing on disparate impact grounds came as a blow to the environmental justice movement, history shows that the path was not particularly effective at any rate.[176] Stronger provisions against discrimination, however, might

[175] Administrative Complaints are discussed in Section 5.4.1

[176] Inter alia as a textbook summary see Hill *Envtl. F. 5 [2002]*, p. 37, noting the hurdle of intent made it an inconsistent mechanism. History also reveals that suits involving disparate provision of municipal services were more successful. See Hoidal, Sten-Erik Returning to the Roots of Environmental Justice: Lessons from the Inequitable Distribution of Municipal Services. *Minn. L. Rev.* 88 2004, p. 210. These situations provided a spatial boundary defined by the non-provision of some service like sewers, sidewalks, or street-lighting. The non-provision became hard to justify outside of intent readings. In environmental justice usage, however, the "non-provision" would be the lack of an environmental benefit—a lower environmental quality relative to that enjoyed by the majority. This is a reversal of logic that even with more notable spatial boundaries—which depending on the environmental problem are not as assured as, say, where street-lighting ends—is not necessarily amenable to the denial of municipal services jurisprudence. Also see Moreau, Sophia Reibetanz Equality

prove more effective, not only against discrimination but toward application in environmental directions.

5.3.3 Section 1983

Section 1983[177] (§1983) predates the civil rights act of 1964 and its §§601,602 by nearly a century, entering U.S. code in 1871.[178] §1983 guarantees that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage of any State of Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

It was created to provide a civil remedy to discrimination, direct action against perpetrators of violations of federal law.

As with the EPC and the powers in Title VI the wording of §1983 sounds powerful and reassuring in the face of the blatant racism present in America, especially at the end of the Civil War. Originally though the Act only provided for redress of breaches of Constitutional rights.[179] The term "and laws" was only added to the Act in 1874. The "Laws Clause", as it is known, adds as much ambiguity to the protections here as the weakness above with the EPC and the problems with the sections of the civil rights protections. What Congress ultimately meant by "laws" determines how applicable this civil rights protection is to environmental justice claims. There are relatively few "rights" guaranteed by the Constitution and hence very little to enforce via §1983 if the section is read narrowly. But there are many laws, and even more regulations. If then Congress intended that laws and regulations—correctly promulgated—are just as good as rights, then there is also the potential for much broader application for §1983.[180] The potential to hold private defen-

Rights and the Relevance of Comparator Groups. *J.L. & Equality*, 5 2006

[177] 42 U.S.C.S. §1983

[178] Civil Rights Act of 1871 codified at 42 U.S. Code 21 1983 & 1988

[179] Mank *Fla. St. U. L. 32 [2005]*, p. 851.

[180] Davant IV.

dants criminally and civilly liable for violations of civil rights is decided by the size of the legal foothold.[181]

In the dissent in *Sandoval* the idea was raised to press otherwise §602-bound complaints toward §1983. The concept of moving §602 claims now blocked by *Sandoval* to §1983 claims revolves around the thought that if the litigant can prove a state agency deprived them of privileges granted to them (the litigant) via regulations pursuant to §602 then they can bring a §1983 suit against the agency. The question of private standing on §1983 itself is already sound.[182] Furthermore, there is precedent that action's brought under §1983 can enforce other statutes,[183] including §602 of Title VI.[184] One should note, however, that the presumption is *against* an implied right of action.[185] The burden is always on the plaintiff to show an intent existed to create a right of action.

Unfortunately simply detouring environmental justice claims previously slated for §602 litigation to §1983 has problems. The problems come in the form of the recent Third Circuit's decision in *South Camden v. New Jersey Dept. of Environmental Protection*, (*Camden III*)[186] Although the case is discussed often with an eye to *Sandoval*, §1983's logic is truly independent of the pure questions raised about §602. The main question on the §1983 pathway is whether or not a regulation created a right, and then whether that right was broken by an agency or person. The connection to *Sandoval* then comes in because the rights under review in *Camden III* would stem from §602. The §602 logic questioned whether an agency's regulations are a law and it is not all together obvious what regulations could create a *right*. The lack of obvious connection truncating a plaintiff's connection to §1983, at least in the eyes of the *Camden* court.

In order to bring a §1983 suit, the plaintiff must assert violation of a federal right[187] In the context of environmental justice coverage, plaintiffs hoped to

[181] Ratner, Steven R. Corporations and Human Rights: A Theory of Legal Responsibility. *Yale L. J.* 111 2001, p. 499.

[182] *Wright et al. v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987).

[183] *Suter v. Artist M.*, 503 U.S. 347 (1992)

[184] *Powell v. Ridge*, 189 F.3d 387 (1999), notably reaffirming their *Chester Residents* decision to uphold private standing even *after* the vacatur of *Chester*. See Lambert, p. 1160

[185] *Suter v. Artist*, at 363-364 and Ibid., p. 1237

[186] 274 F.3d 771 (2001) Also *Gonzaga University and Roberta S. Leauge v. John Doe* (*Gonzaga*), 536 U.S. 273 (2002).

[187] *Golden State Transit Corp v. City of Los Angeles*, 493 U.S. 103, 106 (1989). Defendants can, however, show that Congress specifically foreclosed a remedy under §1983 with

assert that a right to be free of disparate environmental impacts were created from the EPA's implementing regulations pursuant to Title VI, §602. But when does an implementing statute create a federal right?

To answer this question courts apply yet another test; the *Blessing* Test.[188]. In language that recalls the related *Cort* Test, the *Blessing Test* attempts to get at the intention of the authorizing mandate handed down by Congress.[189] Naturally, the regulations in question must carry the force of law, a force checked by the *Chrysler* Test.[190] The Supreme Court has held that the harm caused by regulations—as laws—can stem from action on the part of a government entity or agency that "implemented or executed a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers, or the result of the entity's custom."[191]

In short then, the legal pathway to environmental justice via a §1983 claim is essentially a claim that a person has been deprived of a right. Suing to enforce a statute and suing to enforce a statute via §1983 are different things, however. The first is what plaintiffs attempted in *Sandoval*.[192] From both *Sandoval* and now from the *Gonzaga* case, the bar for private standing to

a enforcement mechanism for protection of a federal right. See *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) and discussion in Mank *Fla. St. U. L. 32 [2005]*, p. 858-9

[188] *Blessing v. Freestone* 520 U.S. 329 (1997)

[189]

1. Did Congress intend the provision in question to benefit the plaintiff?
2. Is the intended right clear enough, i.e. not be and amorphous, not to strain judicial competence?
3. Does the enabling Statute unambiguously impose binding obligation to the state? That is, it must be worded as mandatory over precatory terms.

Ursic

[190] See Section 132 In an environmental example then, on would look at EPA regulations in Section 7.30, 7.35A,B. cf. Ibid. See also *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973) and discussions in Hoffer, p. 995-6.

[191] *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 690-691 (1978). Forsythe, Ian *A guide to civil rights liability under 42 U.S.C §1983: An Overview of Supreme Court and Eleventh Circuit Precedent.* website. See also *Maine v. Thiboutot*, 448 U.S. 1, 4 (1979), reading §1983's "Laws Clause"—"secured by the Constitution and laws"—to encompass federal statutory regulations. cf. Hoffer, p. 992. The dissent in *Maine v. Thiboutot*, however, noted that the amended "Laws Clause" in §1983 only refers to enforcing equal rights statutes, and not all federal statutes. See also Mank *Fla. St. U. L. 32 [2005]*, p. 854.

[192] And after *Sandoval's* direct comments on standing under §602, *Gonzaga's* decision seems to set the logic in stone. *Gonzaga v. John Doe*, 536 U.S. 273 (2002) Also note modifications of the *Cort* standard in *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). These cases can be viewed as connecting the *Cort* criteria more tightly to legislative intent. *See* Lambert, p. 1230

sue to directly enforce a statute is much higher. Potential litigants have to show both congressional *intent* to grant them a right based on that statute and that they allow them to privately enforce it.[193] There is then a higher "congressional intent test" for implied rights of action. The word "intent" has never been particularly welcoming to environmental justice ears, and it continues its infamous role here.

As a private remedy exists explicitly under §1983, but no substantive rights in an of itself, the pivotal hurdle is to show congressional intent to establish a right in their favor.[194] The use of civil rights mechanisms to enforce the well-intentioned EPA regulations is stuck between *Sandoval* and *Gonzaga* without much judicial wiggle room. Viewed in light of recent cases then, the connection between §1983 and §602's implementing regulations is significantly obscured compared to what Justice Stevens implied in his optimistic *Sandoval* dissent. Even if the direct connection between §1993 and §602 *should* exist[195] environmental justice advocates know that any dilution of the connection between their case and the Civil Rights laws they utilize works terribly against them.

5.3.3.1 South Camden Citizens in Action

South Camden Citizens in Action v. New Jersey Department of Environmental Protection[196] struck the fatal blow to the loophole pointed out in the dissent of *Sandoval*; making *Sandoval* and *Camden* a 1-2 punch to anyone hoping to utilize any of the most accessible civil rights protections in the U.S. toward environmental ends. Here, the Third Circuit Court extended the *Sandoval* decision to remove private right of actions under §1983 as a whole, essential making Justice Stevens' idea to open up §1983 irrelevant.

The *Camden* cases involved a serious of decisions by the New Jersey Department of Environmental Protection (NJDEP) which led to the disproportionate polluting of an area in South Camden, New Jersey, which is predominately minority and poor.[197] The case moved to block the construction of another polluting facility by claiming the disparate environmental impacts violated §1983

[193] Mank *Fla. St. U. L. 32 [2005]*, p. 881.
[194] Forsythe.
[195] see Hoffer, p. 992-8
[196] 274 F.3d 771 (3d Cir. 2001), often *Camden III*. certiorari den. 536 U.S. 939 (2002).
[197] Note, p. 1787. For a short history of the area and the dynamics which led to the situation from academics who worked on the case, see Bowen, William M/Atlas, Mark/ Lee, Sugie Industrial Agglomeration and the Regional Scientific Explanation of Perceived Environmental Injustice. *Annals of Regional Science*, 43 December 2008, Nr. 4.

of the Civil Rights Act. St. Lawrence Cement had applied for a permit to add more nitrogen oxides and other airborne pollutants, in edition to a substantial increase in truck traffic delivering material for processing,[198] to a community of more than 91% black and Hispanic residents, over half of whom live below the poverty line.

In the cases leading up to *Camden III*, a lower state court had previously held that the plaintiffs had good standing and a case sufficient to grant an injunction against the NJDEP.[199] After the decision however the court reconvened to determine whether the judgment stood post-*Sandoval*, as the Sandoval decision irreparably damaged *Camden I*'s legal reasoning.[200] *Camden II*, however, held on to the reasoning from *Camden I*. The court interpreted *Sandoval* narrowly and believed, as Justice Stevens did, that it only foreclosed a private cause of action under §602. Therefore, the *Camden* case's logic was still valid as long as applied through §1983.[201]

The *Camden II* court utilized *Wright v. City of Roanoke*[202] and *Blessing v. Freestone*[203] to show that precedent indeed existed under §1983. The higher Third Circuit Court of Appeals disagreed, and reversed the holding in *Camden III*. Crucial to the reversal was the Circuit Court's reading that the it was the EPA's administrative regulation enforcing Title VI through which the plaintiffs accessed their standing under §1983. The Court appears to view the leap from §1983 to EPA regulations as too far to award a remedy by stating that the interest looking to be enforced must be implicit in the statute authorizing the regulation. The administrative regulation, as an implementation of a statute and not the statue itself, thus falls under the intentional discrimination language intrinsic in Title VI (the authorizing statute), and cannot therefore create a right to discriminatory impact remedy via §1983. Although both §1983 and Title VI been held elsewhere to create enforceable rights the statutes of Title VIs have more direct connection to §1983 than regulations promulgated as a reaction to Title VI and hence the greater strength as a legal

[198] 274 F.3d 771, and Hill *Envtl. F. 5 [2002]*, p. 39

[199] 145 F. Supp. 2d 446 (D.N.J. 2001), *Camden I*

[200] 145 F. Supp. 2d. 505, *Camden II*. cf. Hoidal, p. 207

[201] Ibid., p. 208 Besides Justice Stevens' dissent, there is precedent supporting the substitution between §602 standing and §1983. In *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999) where plaintiffs pursuing disparate impacts remedy were allowed to employ either §602 or §1983.

[202] 479 U.S. 418 (1987)

[203] 520 U.S. 329, (1997), The source of the *Blessing* rights test, which sets out protocol to decide whether Congress created a right.

connection. It is the EPA's administrative regulation—one step downstream from the "authorizing statute" of Title VI—which governs disparate discriminatory impacts and the congressionally-created statutes under Title VI only apply to intentional discriminatory actions. The *Camden* court therefore saw that plaintiffs cannot enforce disproportionate impact claims directly through §1983.[204]

It is unclear however whether the Court thought that the agency regulation defined a right already implicit in the empowering statute and therefore stemming directly from Congress or whether the regulation itself created a right, drawing on its power to do so by its congressional mandate. If the former is true, then the Court set precedent that the right must start itself with Congress' intent. Judicial scrutiny then should focus on the existence of rights-creating language in the congressional statute. If the latter were the reasoning then the precedent is to first assert whether the congressional statute granted the power to make a right to the agency, followed closely by an analysis of whether the enacted regulation constitutes a right within the power Congress granted the agency.[205] Again, Congress is the only body which can create individual rights in U.S. lawmaking. The difference in the two scenarios then turns on whether Congress created the right, or created a right (for an agency) to create a right (for an individual) via their regulations.[206]

This latter scenario was viewed as "troubling" by Justice O'Conner in her dissent in *Wright* because such broad reasoning, that any federal regulation creates an enforceable right, potentially creates judicially-inferred rights where Congress had no intention.[207] Indeed, her dissent may be the source of some overlap in the reasoning between cases questioning private standing and §1983 enforceable-rights cases—where standing is not an issue. She explicitly mentions the bridge of "Congressional Intent", as the connection between finding

[204] The Third Circuit's reasoning also rules out the use of *Wright* as support of *Camden II*. In *Wright*, the regulations in question defined the term in question of generating a right—in that case, what "reasonable rent" meant—and that right-granting regulation explicitly and directly benefited the plaintiffs. The regulations therefore carried the force of law and established a federal right.

[205] See discussions at Mank *Fla. St. U. L. 32 [2005]*, p. 860-864, and footnote 116, as well as Idem *Hous. L. Rev 39 [2003]*, p. 1463-64

[206] Echoing the ambiguity from the Supreme Court decision is the split in interpretation at the Federal Court levels. See Idem *Fla. St. U. L. 32 [2005]*, p. 864-67. *Compare* the ECHR, which is expressly a "living document," and therefore is interpreted not only on the intent of the writers, but how the phrasing is *contemporaneously* viewed. The textual criticism that comes in to play in the American discourse is absent.

[207] See *Wright*, 479 U.S. 438 (O'Conner, J., dissenting)

an implied right of action, and an implied right.[208]

The *Wright* ambiguity did some damage to the *Camden* case. Although EPA regulations promulgated under §602 prohibit discriminatory effects, the authorizing statutes, §601 and §602 of Title VI, never define such a term. Hence, the EPA's discriminatory effect regulations are called into question as to whether they carry the force of law, breaking the chain of logic before reaching the question of whether they can grant an enforceable right. In *Camden*, this fact served to disconnect the plaintiff's logic from the precedent in *Wright*.[209] The court called into question the distance a plaintiff must be to the empowering statute in order to truly be the intended beneficiary, as required by the *Blessing* test for a statute creating a federal right. §602 focused on agencies, which is twice removed from plaintiffs over the direct funding agencies. In the logic of the court, that is a significant legal distance for a plaintiff to wield §1983 over.

Camden also shows how the older *Blessing* test has fallen under the newer *Gonzaga* ruling.[210] The logic in the *Gonzaga* case requires that congressional intent to bestow a right enforceable by §1983.[211]. The Court cited §601—with its explicit intent standard for discrimination—as an example of congressional rights-creating language. The focus in rights-creating language also should lie on the individual, and not the aggregate.[212]. These new, higher, requirements hurt the potential which existed under the *Blessing* test for showing that a statute creates a right, and have even led to new precedent saying that administrative regulations can *never* create rights which could be enforced through §1983.[213]

Above the contentions of the listed court decisions, there is also an open question of whether allowing citizens remedy via §1983 action on regulations via Title VI would even exceed Congress's power to do such a thing based on their mandate and in Article I of the U.S. Constitution.[214] *Mistretta v. United*

[208]Mank *Fla. St. U. L. 32 [2005]*, p. 862-3.
[209]Ursic.
[210]*Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)
[211]Hoffer, p. 998.
[212]Ibid.
[213]See Save Our Valley v. Sound Transit *Recent Cases: Federal Courts—Civil Rights Litigation—Ninth Circuit Holds That An Administrative Regulation Can Never Create an Individual Federal Right Enforceable Through §1983—Save Our Valley v. Sound Transit, 335 F.3d 932 (9th Cir. 2003).* 117 Harv. L. Rev. 735, 2004; Campbell, Andrew L. Can Federal Regulations *Ever* Create Federal Rights Privately Enforceable Under Section 1983? *Ind. L. Rev.* 38 2005.
[214]Eastland, Keith E. Environmental Justice and the Spending Power: Limits on Using

States[215] clarifies some ambiguity as to how much power Congress, via its legislative mandate, can delegate to agencies other branches of government over the non-delegation clause in Article I, Section 7 and the Due Process Clause of the Constitution.[216] Expansive reading of §1983 could push federal laws too deeply into state sovereignty terrain, as noted by Justice Powell in *Maine v. Thiboutot*. With that in mind it one can couch the *Sandoval* and *Gonzaga* decisions as attempts to reign in potentially problematic issues.[217] These issues all present the legal can-of-worms in which we find the *Sandoval* and the *Camden* judgments, and hence the predicament face by an environmental justice advocate looking to argue the judgements away.

Above the more esoteric issues, the lower court's reasoning and denial of standing in *Camden* echoes their shyness to infer discriminatory intent from outcomes. They continued their tendency to narrowly and castiously interpret the intentions of legislative directives. The Supreme Court put their approval on the cautiousness in denying certiorari.[218]

Between the *Sandoval* and *Camden* decisions, held together with the higher standards of *Gonzaga* requiring a deeper reading of congressional intent, the courts have created the precedent that "an administrative regulation cannot create an interest enforceable under [the statute] unless the interest already is implicit in the statute authorizing regulation."[219] But there is the chance, as will all common law doctrine, that *Camden* could be overturned, however. But as this section comes to a close, it should be remembered that even if the decision were overturned, reopening the §1983 as a legal pathway toward enforcing §602, the issue of whether regulations extending to disparate impacts, and not only intentional discrimination, are valid would likely reappear.[220] Recall too that these somewhat esoteric issues of law are one step removed from the problems of identifying whether or not the outcome is discriminatory

Title VI and §1983. *Notre Dame. L. Rev.* 77 2002.

[215] 488 U.S. 361 (1989)

[216] Mank *Fla. St. U. L. 32 [2005]*, p. 869.

[217] Ibid., p. 855 Further, there is the theoretical question that if an agency cannot promulgate disparate impact regulations pursuant to Title VI, than how are Congress' powers under Section 5 of the Fourteenth Amendment different? For discussion see Laufer; Mank *Fla. St. U. L. 32 [2005]*; Davant IV.

[218] *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 536 U.S. 939 (2002).

[219] This quote, from *S. Camden Citizens in Action v. N.J. Dept of Envtl. Prot, 274 F.3d 771, 774* speaks directly to §1983, but the logic applies to the broader *Sandoval* decision governing §601 and §602.

[220] Note, p. 1781.

and then another step away from from expanding environmental protection in a form not dependent on the makeup of the group—a suspect classification—alleging the problem.

The Camden case is, after all, well researched as to its spatial implications. Bowen, Atlas, and Lee added much to Chapter 3 by explaining how much spatial economics can add to the environmental justice conversation. The gravity of firms locating in a certain area contributed more to the explanation of facility permitting than did the pattern of the distribution of minority residents.[221] In addition to changing the results from models which did not include agglomeration as an explanatory variable, the new variable brought with it significantly greater explanatory power and reduced other statistical problems relative to the non-agglomerated model.[222] Industrial and residential patterns have likely co-evolved to reveal the pattern we see today, so the inclusion of a measure of that history in the form of agglomeration is relevant. Here we come full circle, as that work was done to help answer whether there was discrimination in the *Camden* situation.[223] As that section illustrates, the failure to take into consideration the economics of agglomeration leads to inflated correlations between race and locations. Thus even allowing for standing the eventual outcome may not have been toward protection of the plaintiff's environments.

Before leaving this convoluted topic, it needs to be noted that although private rights of action do not exist where they once did, and that the force of disparate impact regulations created to enforce §601 are questioned, does not mean the statutes will not be enforced. The statutes themselves must still be enforced, but now that enforcement must come from within the EPA or other agency. Previously, the beneficiaries were able to aide the EPA in their oversight efforts by bringing issues to the attention of the courts. The situation now leaves a particularly large burden that was previously aided by citizen oversight. Citizens can still appeal for proper enforcement through administrative complaints.[224] Ironically, §1983 may be used in an alternative sense and see a revived usage in environmental justice if litigants can show that agencies have engaged in "deliberate indifference"—a framing of discrimination which has already been successfully used in racial and sexual harassment

[221] See Section 3.4.
[222] Bowen/Atlas/Lee.
[223] Ibid.
[224] Hill *Envtl. F. 5 [2002]*, p. 40.

situations.[225] Outside of civil rights litigation, the EPA also encourages alternative measures for dispute resolution[226]. Such alternative abilities speak toward an ability to protect the environment through public participation and perhaps even access to information, similar to the abilities granted under the ECHR and the Aarhus Convention, but here they reside relatively below the level of importance of a "right" and rest on administrative remedies.

5.4 Associated Rights Protections

The recent removal of civil rights pathways toward environmental justice may have been a legal blow to environmental justice advocates but the pathways themselves have not been particularly successful in achieving the aims of environmental justice thus far.[227] Even as far back as 1994, just as the environmental justice movement was gaining significant traction, Luke Cole, in frequently cited work, placed Civil Rights laws in third place in his list of four tools for pursuing environmental justice *behind* utilizing environmental laws.[228] These problems, or at least the potential for convoluted problems, were foreseen. The provisions in the U.S. code against discrimination are not, however, the only civil rights protections that could inform the derived-EHR discussion. The following sections detail information on the Fair Housing Act and protections against employment discrimination. While these, like the above protections, operate through the lens of discrimination, they add both information to the U.S. legal picture as well as confirm that even outside of the main armaments utilized thus far for environmental justice purposes there is little evidence or hope for deriving environmental protections via rights.

5.4.1 Administrative Complaint

Because the problems arising between minority groups and agencies receiving funding from the federal government are often administrative in nature, an

[225] see Faerstein, Brian Resurrecting Equal Protection Challenges to Environmental Inequity: A Deliberately Indifferent Optimistic Approach. *U. Pa. J. Const. L.* 7 2005 and Black, Derek Picking up the Pieces after Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact. *N.C. L. Rev*, 81 2003

[226] Hoffer, p. 999 and see the EPA's Alternative Dispute Resolution Law, Policy and Guidance at http://www.epa.gov/adr/cprc_policy_guidance.html [last accessed Sept. 7, 2007]

[227] Worsham, p. 705.

[228] Cole *Fordham Urban Law Journal 21 [1994]*, p. 526.

administrative complaint is a common and effective method for rectification.[229] Although an administrative complaint, especially via the US EPA, involves regulatory structures that left otherwise are untouched by the rights discourse, it deserves mention here as part of the complete comparative picture between U.S. and European extended environmental protections, especially in view of its relation to access to information and procedural rights in Europe. As regulations within agencies like the EPA are promulgated following Title VI mandates there is also a direct connection to the previous discussion.

In brief, an administrative complaint allows a party to allege that the agency is not following its own regulations. It does not need to then go the extra step and allege that the failure of the agency to properly mange or regulate results in discriminatory outcomes. After all, there there are many ways one can justify a disproportionate impact. Apart from the movement of the inanimate economy and the statistical problems discussed in Chapter 3, problems which viewed from the other side of the argument are not always seen as problems, legal or otherwise, there is the problem that most agencies are not the parties choosing a site or and therefore they are not the people causing the discriminatory impact.[230] Administrative complaints, however, are not tied to the logic of anti-discrimination. That automatically relaxes restraints on standing. A community does not have actually be a member of a the protected class in order to file a complaint alleging discrimination against a Title VI protected group.[231] It is certainly up to the complainants to establish a strong connection between the eventual choosers (of environmental problems) and the agency against which failure to comply with their regulations is alleged. Of course, if the offending polluters do not receive federal funding, they are protected from a discriminatory suit against the agency which regulates them. But at the start there are lower hurdles relative to civil rights litigation.

Formally, and in the environmental context, an administrative complaint is filed with the EPA's Office of Civil Rights (OCR). The OCR came into being partly through President Clinton's urging and then explicitly because of the enacted Executive Order 12898,[232] the major, if non-binding, piece of law in

[229]For an extensive discussion, as well as a record of the first such cases lodged with the U.S. EPA see Cole, Luke W. Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964. *Journal of Environmental Law and Litigation*, 9 1994

[230]Ibid., p. 314.

[231]Ibid., p. 390-91.

[232]Section 5.4.4

the U.S. mentioning environmental justice.[233] If there is merit to the complaint, the OCR will notify the parties involved and elicit written statements and attempt informal resolutions. While the specifics of the complaint path are not pertinent to the current work, it is sufficient to note that the pathway exists, and it is accessible for common citizens. They must only draft a letter to the OCR. Of course, the more legally focused the letter is, the more likely the OCR will find merit to the claim.[234] Thus there is always an ability to lodge a complaint with an environmental agency, divorced from discrimination logic and even from suspect classifications.

The administrative complaint though is a far cry from access to courts, remedy, and information as defined in Europe. Access to remedy remains enshrined at the constitutional level with the Due Process Claus, but that has not been applied to environmental contexts in the way it has in Europe. Access to remedy generally remains at a lower level in the U.S. through interaction with agencies implementing congressional legislation. In fact, part of the more open applicability stems from there being limited bite to an administrative complaint. Within the EPA, accepted administrative complaints can be resolved informally. This is the most likely and prudent choice as well. However, in the form environmental justice complaints usually take, an informal resolution is quite limited relative to granting an injunction to halt construction or remove a siting decision. An informal resolution can be as light as getting the potentially-discriminatorily effecting company to go back to the public participation phase of permitting. The agency can also refer the case to the Justice Department, or indeed choose to do nothing.[235]

Although the benefits to filing an administrative complaint over pursuing formal litigation on civil rights grounds may favor—empower—the small groups usually at the center of the U.S. environmental justice stage, the drawbacks as far as public participation enablement are substantial. An informal process, capable of being executed by a community without legal assistance or expense strongly benefits small communities is quite helpful.[236] However,

[233] Crossman, Brian Ressurrecting Environmental Justice: Enforcement of EPA's Disparate-Impact Regulations through Clean Air Act Citizens Suits. *B.C. Envtl. Aff. L. Rev.* 32 2005, p. 604.

[234] For specifics on administrative complaints, see Ibid. and Mank *The Law of Environmental Justice*, p.27-29

[235] Cole *Journal of Environmental Law and Litigation 9 [1994]*, p. 318 Notably, the "do nothing" choice is often a result of limited agency resources to process such complaints.

[236] Although the framing of the complaint in proper legal channels may bring benefits.

once filed, the community is left completely out of the loop; there is no back-and-forth discussion nor revelation of new information. The agency conducts its own internal investigation, which also affects the available remedies, leaving the full removal of agency funding as the only substantial penalty. No penalties are available to the aggrieved and full removal of funding is commonly held to be too harsh to serve as a credible deterrent to a potential offender. The EPA would rationally only choose this method if the environmental benefits of the program were minimal.[237] Further, there is effectively no time limit within the EPA to decide on a complaint.[238] However, they are also not barred from pursuing formal legal action during the interim.[239] That is, the administrative remedy must not be exhausted. However, it is unclear as to whether it must first be at least attempted.[240]

Regardless, this is another convoluted set of instructions for a disadvantaged group of people to navigate in hopes of getting even well-meaning regulations to function as they view they should. Even if they have erred in their opinion of the outcome there is significant time and energy costs to accessing even a negative response for a solution. From even a brief discussion it is obvious that an administrative complaint does little to shore up information exchange or public access relative to the ECHR, at least as far as guaranteeing participation and access to information in manners approaching Article 10 and the now-attached Aarhus regulations in Europe.[241] This may be an unfair direct comparison given their very different sources and rationale. In the context of a comparison between abilities to derive environmental protection, however, it is another hole in the umbrella of protection in the U.S. relative to Europe.

Cole *Journal of Environmental Law and Litigation 9 [1994]*, p. 319-21,398-90

[237] La Londe, p.38.

[238] Cole *Journal of Environmental Law and Litigation 9 [1994]*, p. 321,387 Previously held doctrine that individuals could not punish agency slowness in processing claims via the Administrative Procedure Act (APA, 5 U.S.C. §704 (2000)) because individuals had (perceived) standing to sue directly may now be open due to the loss of individual standing through *Sandoval*. See La Londe, p.39

[239] See *Cannon v. University of Chicago*, 441 U.S. 677 (1979)

[240] *Scelsa v. City Univ. of N.Y.*, 806 F. Supp. 1126 (S.D.N.Y. 1992), cf. Cole *Journal of Environmental Law and Litigation 9 [1994]*, p. 323

[241] Sections 4.2.4, 4.2.4.2

5.4.2 Fair Housing Act

The Fair Housing Act,[242] like other provisions of the civil rights acts, came to power to address a specific claim of lingering racism in the United States. A part of the Civil Rights Act of 1968, Title VIII addressed the concerns of the *Kerner Commission Report*. The report summarized the causes of the major race riots of 1967 as an outpouring of minority frustration with the U.S. "moving toward two societies, one black, one white—separate and unequal." As such, the FHA moved to prohibit discrimination in the "terms, conditions, privileges, services, or facilities connected with sale or rental housing" that otherwise might come to pass between the two worlds.[243] Its entire purpose was to bring about "truly integrated and balanced living patterns."[244]

The connection to the sale and rental of housing is perhaps overlooked by U.S. lawyers investigating environmental injustices.[245] The FHA is applicable to a wide array of situations dealing with the habitability of dwellings and hence touches on environmental conditions in ways that could, but as of yet have not significantly, serve as an analogue for the protections to the home in the ECHR. The connection is certainly not parallel and given the more strict milieu illustrated in the civil rights pathways, this could be a stretch currently. Nevertheless, it bears discussing not only because of its possibilities[246] but because the discussion shows the same difficult legal environment illustrated

[242] 42 U.S.C. §§3601-3631, most importantly to the environmental justice situation are §3604(b) and §3617

[243] Brown, Alice L./Lyskowski, Kevin Environmental Justice and Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act). *Va. Envtl. L. J.* 14 1995, p. 743. Or as, stated by the U.S. Department of Housing and Urban Development (HUD), the FHA "prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status (including children under the age of 18 living with parents of legal custodians, pregnant women, and people securing custody of children under the age of 18), and handicap (disability)." [from http://www.hud.gov/offices/fheo/FHLaws/]

[244] Guill, p. 226, quoting Senator Walter Mondale. This quote, carrying as it does some implication of equitable distributions, should not be inferred however as representative of the legislative climate at the time of the Act's passage. Much discussion focused on the Act's ability to enable motion on behalf of minorities, in response to job migration out of city centers. See ibid., p. 227-8.

[245] For an example of the ideas that limit the use of the FHA, see *Laramore v. Illinois Sports Facilities Authority*, 722 F. Supp. 433 (N.D. Ill. 1989), which dismissed fair housing claims because there was not an adequate connection to the sale or rental of property.

[246] Detailed in specific situations such as Hurricane Katrina in Rajotte, Benjamin A Housing-centred approach to Justice. *J. Envtl L. & Litig*, 24 2009; idem Environmental Justice in New Orleans: A New Lease on Life for Title VIII. *Tulane Environmental Law Journal*, 21 2008 and in general in Crawford, Colin; Gerrard, Michael B., editor Chap. Other Civil Rights Titles In The Law of Environmental Justice. American Bar Association, 1999

above with protections against discrimination. The conclusion is therefore that even if it could be beneficial, and if one could apply Title VIII toward environmentally protective ends, it would not be as straightforward or as broad as the protections derived from Article 8 of the ECHR.

In brief, §3604(b) of the FHA prohibits active discrimination associated with housing transactions and in the provision of services surrounding housing transactions. The duplication of the word "transactions" here is important and the first indication that this protection might have an upper boundary. Indeed, the discriminatory acts must have linkage to the transference of housing, be that selling or renting.[247] There must be a harm done to the ability to acquire or hold property that has a segregating impact. According to Rajotte, §3604(a) aims to prevent the removal of housing options from those who would be discriminated against while §3604(b) covers conduct that affects the nature of the housing, conduct that could make the housing undesirable and thus effect discriminatory outcomes.[248] Further, §3617 guards access to these provisions, protecting against backlash and interference.[249]

Here there are protections against certain forms of discrimination in housing as well as protections for fair enjoyment of that housing. The protection though comes through the lens of discrimination. It is not expected to be able to widen as much as familial connections protection in the ECHR then. However, it is a broader discrimination protection in the U.S. because plaintiffs must not meet Title VI's nexus of federal funding requirement here. Hence, Title VIII is actionable against fully private institutions providing housing and housing services. More powerfully, it does not require the plaintiff to prove *intentional* discrimination.[250] Discriminatory effect or the higher evidence of intent find protection in the FHA, anything that grants segregative effects to the housing picture in the U.S.[251] It is also well established that individuals have standing on Title VIII complaints.[252] There will not be a chance, like *Sandoval*, where

[247] *Cox v. City of Dallas*, 430 F.3d 734 (Fifth Cir. 2005).

[248] Rajotte *J. Envtl L. & Litig 24 [2009]*, p. 169.

[249] *United States v. Koch*, 352 F. Supp. 2d 970 (D. Neb. 2004); interpreting the statute as preventing interference with enjoyment of the home.

[250] *Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988), *aff'd* 844 F.2d 926 (1988), as early, if tacit, evidence of the Supreme Court's willingness to allow FHA cases with a showing of disparate impact instead of intent. Compare *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003) *vac'd in part* 263 F.3d 627 (2001).

[251] *Summerchase Ltd. P'ship I v. City of Gonzales*, 970 F. Supp. 522, 528 (M.D. La. 1997)

[252] 42 U.S.C. §3613(a) (2000)

this pathway will suddenly close down.

Suits alleging obvious discriminatory housing practices and practices affecting the *opportunity* to acquire housing, which may including keeping existing housing in the face of relocation, find protection here as well.[253] As many decisions by town and urban planners, environmental siting, among others, affect the future of housing opportunities, the FHA can be viewed as casting a wide net aimed at hauling in all forms of discrimination in the housing market.[254] The actions the FHA though reach only the provisions of services and facilities in connection with the sale or rental of housing.[255] The statutory construction forces a reading on what Congress intended by "in connection with" and with "sale or rental." Suffice it to say here that the courts have construed the intention narrowly and "sale or rental" applies reservedly to the *process* of selling and renting.[256] Provision of services to that housing is generally bounded by services attributable to governmental bodies: police, fire, garbage.[257] It is up to the plaintiff to bring a lack of provision in line with segregative effects.

FHA claims are also strong connection between a defendant's actions and the *future* availability of housing for minorities. Here, it should be noted that the FHA applies only to protected classes and would not apply to housing moving to lower income classes, for instance. One trades some ability to extend protection in the enjoyment of the home outside of specifically minority areas. There is however the broader power of §3617 which extends to protection from acts of intimidation meant to dissuade minorities away from housing areas or persuade them to leave what they already have. This power, while still applying to selected classifications, applies in situations not limited the buying and selling of property.[258] The wording is broader in that it extends to actions which interfere with the enjoyment, relatively broadly defined, of housing, and not merely the prevention of its attainment. As all of these legal pathways are far less traveled than the above Title VI claims and their stand-alone utility

[253] Other protections are discussed in Rajotte *Tulane Environmental Law Journal 21 [2008]*, p. 61-63

[254] E.g. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1998).

[255] 42 U.S.C. §3604(b)

[256] See *Laramore v. Illinois Sports Facilities Authority*, 722 F. Supp. 443 (N.D. Ill. 1989). See also *NAACP v. American Family Mutual Insurance Company*, 978 F.2d 287 (1992)., *cert. denied*, 113 S.Ct. 2335 (1993), reiterating that the protection is associated with the *acquisition* of housing.

[257] *Southend Neighborhood Improvement Assoc. v. County of St. Clair*, 743 F.2d 1210 (Seventh Cir 1984).

[258] *Evans v. Tubbe*, 657 F.2d 661 (Fifth Cir. 1981)

remains questionable, although they do provide detours when the other roads have their own obstacles.

Given their verbal echoes of the "peaceful enjoyment" of one's home sphere in the ECHR, it is worth an attempt to expand environmental protections outward from Title VIII, if only because Title VI has become such a difficult path.[259] Combined with interpretations construing §3604 to prevent redevelopment which would displace minorities from their current affordable housing, it is easy to see how provisions under civil-minded Housing acts can proscribe activities that would fall under an environmental justice heading,[261] and also how that protection could follow the extracted protections of the ECHR, though likely on a more limited scale. Rajotte has done the most recent work on this pathway toward environmental protections in connection with finding a right to a safe and healthy reconstruction after a hurricane in Lousiana.[262]

Despite the untested nature and some limitations, the protections are there.[263] Their ability to extend to environmental problems are possible too, especially in areas of tense racial pressures. Once again one must work through the connection of discrimination if one wishes to apply the housing protections to environmental problems. Title VIII's ability to rectify those problems remains largely untested and so the degree of available protection remains in the realm of conjecture.[264] And because it operates through the lens of discrimination, even broad discrimination readings such as impact over intent, it will necessarily occupy a subset of the protection that the ECHR currently allows. The FHA may well provide stronger and deeper protection where the housing, environmental, and racial components of a situation are tightly meshed, but the ECHR allows for much broader movement away from racial and discrimina-

[259]In a similar vein, Section 109 of the Housing and Community Development Act (HCDA)[260] is a different connection for environmental justice to the civil rights literature. Hoidal (2004) mentions this as a new route replacing that lost after the Revenue Sharing Act (31 U.S.C. §1224(b), (1972-1976)) went out of power. This section was tested in *Miller v. City of Dallas*, No.3 98-CV-2955-D, (US District Court, N.D. Texas 2002). Hill *Environmental Justice: Legal Theory and Practice*, p. 254-263; Hoidal, p. 216 Originating in the Housing and Community Development Act of 1974, the provision prevents agents receiving money under the HCDA from selecting or locating facilities where their benefits cannot be utilized by minority communities.

[261]Brown/Lyskowski, p. 751.

[262]Rajotte *J. Envtl L. & Litig 24 [2009]*; idem *Tulane Environmental Law Journal 21 [2008]*

[263]Protections labeled as "intriguing" by Luke Cole, Cole *Fordham Urban Law Journal 21 [1994]*, p. 534-35

[264]Rajotte *Tulane Environmental Law Journal 21 [2008]*, p. 53

tion issues, thus removing one anchor of the analysis and allowing any derived protection to drift farther out over the housing and environmental area. To conclude, the FHA deserves a discussion as a place to look to extract environmental protections of the sort desired by environmental justice advocates but the fact that it remains bounded to the anti-discrimination perspective necessarily means it will not expand to encompass the same derived-EHR protections of the ECHR. Nevertheless, with its secure private right of action, it may remain the only rights-based approach realistically open to impacting environmental protection.

5.4.3 Employment and Justifiable Discrimination

Title VII of the 1964 Civil Rights Act[265] is not usually discussed in the context of environmental justice.[266] The reason is simple: Title VII prohibited employers from discriminating. As cases of environmental damage have little to do with employment practices, there is no legal pathway here for remediation, at least viewed from the traditional discrimination/environment connection of environmental justice. Nevertheless, Title VII deserves a look as it is the only civil rights protection which explicitly incorporates, as a matter of statute, an discriminatory *effects* standard.

Specifically, under Title VIII, employment practices which are facially neutral but still result in disparities in employment patterns can be found illegal. Unfortunately, the disproportionate impact, devoid of any intent, can also be found legal. The difference rests on whether they are justified as a business necessity. That is, practices which are "job related for the position in question and consistent with business necessity"[267] are legitimate, albeit disparity causing, practices. To cement the idea, this would be similar to amending §602 to encompass disparate impacts while not completely ruling them out in situations where a defendant could show that there was a compelling, non-racially

[265] See above Title VI

[266] Exceptions include the treatment of Lambert, p. 1188-1190, comparing Title VII's burden shifting procedure to possible improvements of agency-based disparate impact oversight under Title VI.

[267] 42 U.S.C. §2000e-2(k)(1)(A)(i); "An unlawful employment practice based on disparate impact is established under this subchapter only if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity;"

motivated, reason.

There exists much jurisprudence weighing when distinctions between classes is justifiable and when they are not[268] In the U.S. employment discrimination cases are often weighed on the three-step *McDonnell Douglas* test[269] There the plaintiff first establishes a prima facie case of discrimination. The burden then shifts to the employer to show a legitimate, non-discriminatory reason for the difference in treatment. If they succeed, the plaintiff then must show that the proffered rationale is a pretext covering discrimination. In the abstract, the balancing sounds analogous to the weighing of interests in margins of appreciation with its back-and-forth dialogue. Though in practice such a case usually starts by establishing comparators and to adduce evidence that the employer has or routinely treats with difference protected classes. The defendant then responds with an attack on the proffered grouping. The conversation can tend to the minutia of a particular employment situation.

More relevant to the environmental discussion though is the fact that the disparate impact was not originally contained in statute, but was interpreted as such in *Griggs v. Duke Power Company*,[270] and later amended into the statute[271] The *Griggs* decision stated that even neutral policies "cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices."[272] Given the unique circumstances of groups, policies otherwise equally applied and neutral may in fact be "built-in headwinds" for those groups.[273] Freezing the status quo is also the concern behind the FHA

[268] In some branches of the literature, the term disparate treatment is used in place of intentional discrimination. See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); the facts of the case are also the likely reason as to why the term "disparate treatment" is used more heavily in Title VII cases than Title VI. . Here at the outset the reader can make a mental note of the broad test for discrimination which rests on showing that "persons similarly situated are treated differently." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) cf. Weinberg *The Law of Environmental Justice*, p. 4. We note here also the tension this statement creates with respect to affirmative action laws, treating groups differently for the benefit of minorities or those still under the shadow of discrimination.

[269] *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973).

[270] 401 U.S. 424 (1971)

[271] 42 U.S.C. §2000e-2(a)(2); "It shall be an unlawful employment practice for an employer to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[272] *Griggs* at 429-30. The Court employs the parable of the Fox and the Stork to illustrate that a neutral policy. There, a neutral policy—the offering of food—works to freeze the status quo when it is offered in a way which works for one group but not for the other—asking the fox to eat its meal out of a dish which it cannot reach the food.

[273] *Griggs*, J. Burger majority opinion.

and its prohibition of segregative practices.

There is a hefty amount of literature surrounding these issues within the jurisprudence of Title VII. Some federal court decisions have followed its lead when analyzing Title VI cases, lending another reason to mention it in this chapter.[274] Likewise, as the disparate impact regime is codified in Title VII the same courts have looked there as guidance when considering disparate impact cases under Title VI (§602).[275] But although the statute explicitly reads a larger view of discrimination, in the context of nationality and sex in the workplace it still has not weeded out stopped discrimination.[276] In particular, the courts have a very difficult time with the expanded Title VII statute, a fact which should give pause to proponents of a codified discriminatory impact standard under Title VI.

In employment discrimination cases under Title VII, including sexual harassment, [277] there is standing for private aggrieved plaintiffs to bring suit. Otherwise, information on sex discrimination might never be exposed. Once the information is available, the suit shifts into oversight mode and answering the question of whether the alleged practice created a *justified* disparate impact or not.[278]

The reason for not outlawing all disparate impact-causing business practices is that some are genuinely good for society. For instance, safety regulations keep the workplace safe. Rules meant to promote safety however can fall with more weight on a particular group. Consider—among many other instances—a weight-lifting requirement which precludes people who cannot lift a certain

[274] E.g. *Larry P. v. Riles*, 793 F.2d 969, 982 n.9 (9th Cir. 1984); *Georgia State Conference of Branches of the NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985) and notes in Mank *The Law of Environmental Justice*, p. 38

[275] *Powell v. Ridge*, 189 F.3d 387 (1999), and notes in Lambert, p. 1189, n.107

[276] *See* Sullivan *Wm. & Mary L. Rev. 47 [2006]*, who summarized the state of employment discrimination practices as of 2006 as "plaintiffs are losing almost all of the cases they file, except for a few isolated ones, most notably sexual harassment claims (p. 912)." He continues, noting that the state of employment discrimination scholarship shows that "discrimination is more pervasive than ever, but only when 'discrimination' is defined in a way that few outside the legal academy are willing to accept," referring to the prevalent nature of "trait" discrimination, which encompasses "behaviors commonly associated with, but not inherent in, particular races." ibid., p. 922

[277] Sexual harassment is not the same as discrimination because of sex, albeit obviously related, and viewed as a subset of sex discrimination. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Nevertheless, the term "sexual harassment" does not appear in 42 U.S.C. §2000e-(2)(a).

[278] There are, of course, problems here as well. Notably, whether one is justifying a business practice or an employment practice. The requisite comparison group would be different under the two categories. *See* Ibid., p. 977, discussing the *Equal Employment Opportunity Commission (EEOC) v. Joe's Stone Crab*, 220 F.3d 1263 (11th Cir. 2000). ff

heavy weight from the applicant pool. Such a requirement would likely exclude more woman than men. An equity analysis then would focus on whether the requirement fills a legitimate and pressing business purpose. The requirement should reflect working conditions and not more; if no employee ever truly must lift that much weight then there is no reason to set the bar so high. However, even with the statute-granted power for courts to analyze whether rules are justifiable or not under a disparate impact regime, they have often tangled the idea together with disparate treatment/intentional discrimination.[279]

Disparate impact is a difficult concept for the courts to wield because its usage depends critically on defining boundaries. Their reluctance were cogent in Title VI interpretation but here they are forced to determine how boundaries are to come to define a comparison group.[280] Likely because of the difficulty, courts dealing with employment discrimination have been willing to *hear* cases of discrimination, but rarely act on them.[281] The reluctance must find some blame in the difficulties.

In order to control the access, the courts have been reluctant to extend disparate impact theory, even in employment discrimination cases where there is no question that disparate impacts are covered by congressional action. Attempts have been made, in the interim, to avoid the bright line distinctions between intent and impact by expanding the definition of intent or expanding the definition of causation without firmly settling into either camp.[282] The

[279]Seiner, Joseph A. Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach. *Yale L. & Pol'y Rev.* 25 2007, p. 113, who cites cases as *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263 (11th Cir. 2000); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Hazen Paper v. Biggens*, 507 U.S. 604 (1993); and *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003); as evidence of long lasting confusion and difficulty for courts to separate disparate impact and treatment.

[280]Notably, the recent *Ash v. Tyson Foods Inc.*, 546 U.S. 454 (2006) has placed a high bar on plaintiffs looking to prove discrimination via comparators. Though the Supreme Court overruled the Eleventh Circuits particularly brusque rational that that relative comparisons prove discrimination only when "the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." at 456-57, quoting *Ash v. Tyson Foods, Inc.*, 129 F. App'x 529, 533 (11th Cir. 2005), it did so only "grudgingly". cf. Sullivan *Alabama Law Review 60 [2009]*, p. 194

[281]Idem *Wm. & Mary L. Rev. 47 [2006]*, p. 927 for comments concerning establishing prima facie employment discrimination cases, and Mank *The Law of Environmental Justice*, p. 38, n. 137, noting simple that statistical evidence likely suffices. See also Foster, p. 1500, noting *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977). Also Oppenheimer, David Benjamin Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Verdicts Reveals Low Success Rates for Women and Minorities. *U.C. Davis. L. Rev.* 37 2004 for evidence of low success rates in employment discrimination, and our *supra* discussion of environmental justice cases for evidence of very limited success despite many attempts.

[282]*See* Green, Tristin K. Discrimination in Workplace Dynamics: Toward a Structural

bridging solutions though overlook the fact that disparate impact is a different theory for the reason that it does not require anyone to be able to "see" anything; there does not have to be a bias at all to achieve discriminatory impacts.[283] The bridging solutions merely look for ways to for courts to "see" more, but not too much.

And this is where an examination of Title VII leaves the environmental justice student, with a feeling that even allowing disparate impact standards in the shadow of the high hurdles of intent standards would not necessarily empower the oppressed to knock out discrimination. With the research at hand, it is a short laboratory experiment within the U.S. legal landscape which lends evidence that adding a disparate impact reading to Title VI—and removing the new roadblocks of standing—would not lead to more protection, especially in the direction of widening the anti-discrimination statutes toward environmental ends. It is by no means conclusive proof that the U.S. is not likely to see environmental justice or derived-EHR protections from their analogous civil rights. Furthermore, and perhaps obviously, it is doubtful that one could position Title VII itself to extend in environmental directions directly. A plaintiff would have to carefully construct an argument connecting discrimination in the workplace fomented by environmental problems. The European Court has, on the other hand, accepted that one's sphere of home life extends to one's ability to create relationships via employment.[284]

5.4.4 Executive Order 12898

The final piece of legislation discussed herein was, at one point, seen as the official arrival of environmental justice concerns within the legal regime of the U.S. Executive Order 12898 seemingly signaled the arrival of environmental justice as a force in environmentalism. The goal of the non-binding executive statement was to place conscious into federal agencies. "The presidential memorandum issued with the [Executive] Order emphasized that existing laws provided federal agencies with the authority to address many environmental

Account of Disparate Treatment Theory. *Harv. C.R.-C.L. L. Rev.* 38 2003, and Sullivan *Wm. & Mary L. Rev. 47 [2006]*

[283] Ibid., p. 969.

[284] *Sidbaris & Džlautas v. Lithuania*, applications nos. 55480/00 and 59330/00 judgment of 27 July 2004. To the extent that environmental degradation retards one's movements and abilities to commingle with other social groups within society, or otherwise segments the social space, we have an analogous problem with environmental justice.

hazards in minority communities and low-income communities."[285] In this capacity, executive orders allow the President to direct federal officers—of which agencies are a part—in the completion of their jobs, within the bounds set in delegating legislative power.

The recognition of the term "environmental justice" in the Executive Order is therefore quite important. No longer would advocates have to spend time convincing agencies what the concept was in their attempts to prevent disproportionate impacts. After all, the EPA distributes over 2 billion dollars[286] of federal funds via 44 programs to 1,500 end recipients. These figures include nearly all environmental permitting agencies.[287] The accepting of federal funding links any and all of these permits through their respective agencies to Title VI compliance. The EPA, however, had a notably lackluster enforcement policy. And despite amendments to the original environmental regulatory Acts in the 1980s and 90s aimed at making compliance more binding, the Title VI enforcement remained lax.[288] The Executive Order then should refocus energies toward meeting §602 goals with the recognition of environmental injustice as a problem.

The signing of the Executive Order pushed to EPA to create its own Office of Civil Rights and issued guidance to permitting agencies regarding Title VI compliance.[289] The recognition though boiled down to a gentle "reminder" of existing responsibilities. Notably, there are many existing responsibilities under the National Environmental Policy Act (NEPA).[290] As the first wave of the major regulatory changes in the 1970s, NEPA forced federal agencies for the first time to explicitly consider the environmental impacts of the programs they initiated. The lofty goals of NEPA are clear from its preamble.

> The purposes of this Act are: To declare a national policy which

[285] Mank *The Law of Environmental Justice*, p. 112.

[286] $2,298,188 projected 2008 EPA budget allocation to Environmental Programs and Management (EPM). available at http://www.epa.gov/budget/

[287] Idem *The Law of Environmental Justice*, p. 25 The notable exception being local water supply and solid waste programs. See Colopy, James H. The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964. *Stan. Envrtl. L.J.* 13 1994, p. 173

[288] Mank *The Law of Environmental Justice*.

[289] *See* Idem *The Law of Environmental Justice*, p.26. The EPA has also issued general guidance on using environmental laws to pursue environmental justice. See *A Citizen's Guide to Using Federal Environmental Laws to Secure Environmental Justice* (2002). available at www.epa.gov. The EPA has also developed videos to assist communities in finding access points toward environmental justice. cf. Hill/Wolfson/Targ, p. 373

[290] 42 U.S.C. §§4321-4347 (2005).

> will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[291]

With its enactment, federal agencies now would have to, before engaging in any major or significant action, investigate and document what would be the environmental impact of their decision. The intent of Congress, which is crucial in subsequent American jurisprudence, is clearly aimed at making the federal government responsible for providing to its citizenry a safe environment.[292]

As the name suggest, NEPA was made to create a national environmental policy, something which was missing from the national conscious before the environmental push of the 1970s. Because its push was directed at changing how U.S. agencies view the environment, it is conceptually quite different than the direct environmental legislation which followed.[293] As there is no explicit mention in the Constitution of a congressional right to regulate the environment, Congress had to ground the new oversight in well trodden territory; their power over federal spending.

In appealing—again—to the power of the purse NEPA connects federal agencies to regulation through federal funding. It also creates a Council on Environmental Quality (CEQ). The CEQ serves as support for the President and his direction of executive agencies' activity. In order to instill an environmental focus in those agencies NEPA first requires agencies to identify and prepare a detailed statement on the environmental impact of their proposal. NEPA is the start of the now ubiquitous term "environmental impact study" (EIS). The environmental impact statement includes what effects cannot be avoided by an agency's proposed action and which aspects are irreversible or include irretrievable commitments of resources.[294] Therein comes also the discussions of alternatives and the weighing of short term gains versus long term gains. The agency should also include a discussion of taking no action. A full discussion of all these points make up an official environmental impact study

[291] 42 U.S.C. §4321
[292] Hill *Environmental Justice: Legal Theory and Practice*, p. 141.
[293] Johnston/Funk/Flatt, p. 82.
[294] Tripp, James T.B./Alley, Nathan G. Streamlining NEPA's Environemental Review Process: Suggestions for Agency Reform. *N.Y.U. Envtl. L.J.* 12 2005, p. 79.

under NEPA and serves as a constant reminder for agency's to think of the environment.[295]

NEPA though was never meant however to be a veto button for all environmentally damaging activities. Neither the EIS or its sibling, the environmental assessment (EA), state definitely what can and cannot be undertaken. They are instead process requirements, requirements which the Executive Order refocused on through the lens of environmental justice.

> "The [Executive Order] simply serves as an appropriate and timely reminder to agencies to become aware of the various demographic and economic circumstances of local communities as part of any socioeconomic analysis that might be required by NEPA or their authorizing statutes."[296]

Even with the recalled focus and guidance, public reaction has remained critical of slow performance and the lack of substantive outcomes. Notably, "executive orders have no binding legal effect outside the executive branch unless authorized by statute, and no statute specifically empowered President Clinton to issue the Order.[297] This means that, should an agency decide they need to modify policies under their control, such as permitting processes, the changes must be adopted through notice-and-comment rulemaking or otherwise Congress must directly put such legislation or authorization forward. The line between an Agency *interpreting* their standing (and Congressionally approved) rules in light of an executive order, and a modification of those standing rules because of a new order, is not always clear. In light of all of this, it is best to view the 1994 Executive Order as providing a stern reminder to all executive agencies of their responsibilities under Title VI, NEPA, and other environmental statutes, as well as the Equal Protection Clause of the Constitution. The Executive Order provided guidance on how to achieve those goals, and commited the executive branch to future oversight of these responsibilities, but stops short of admitting that the legislation already in place grants any substantive rights to environmental justice advocates.

[295] *See* 42 USC §4332(C)

[296] Hill *Environmental Justice: Legal Theory and Practice*, p. 96-100.

[297] The Administrative Procedures Act (APA) under which the EPA and all federal agencies operate requires agencies to use notice-and-comment rule-making to issue new 'legislative rules' or modify existing substantive rules that are judicially binding. Mank *The Law of Environmental Justice*, p. 131; *Also note One Thousand Friends of Iowa v. Mineta*, 250 F. Supp. 2d 1064 (S.D. Iowa 2002).

The reminder though has been interpreted and used by environmental justice advocates to assert that negative socio-economic points were not appropriately considered in filing environmental assessments and impact reports during permitting applications.[298] The executive order can have such teeth through persuasion, but not through enforceable entitlements. For instance, after its enactment, the EPA Region 1's administration pledged to triple the number of environmental inspections at sites operating in low income areas, effectively discouraging polluting in such areas through potential liability.[299] The small victory however adds little in remaining the sea of environmental justice complaints.[300]

Other positive outcomes though included the creation of the Office of Environmental Justice and then the National Environmental Justice Advisory Council (NEJAC), a permanent recognition of the impact environmental tilting has on minorities. NEJAC consisted of around 25 members appointed from community-based groups, from corporate and industrial interests, business, and academic institutions. Their role is to oversee EPA's implementation of environmental justice ideals embodied in the Executive Order and monitor and evaluate their projects' compliance with the Order. Notably missing though from the Executive Order and its wake of implementation were connections to personal or corporate action, even through the dispersed but often powerful purse-strings utilized in Title VI of the Civil Rights Act.[301] In the intervening decade too there has been little forward motion and even less direct utilization.

What seemed at the time to be the crowning achievement of the environmental justice movement in the U.S. has not led to a shift in legal or regulatory discourse nor to the empowerment of citizens. It would appear that this is just last in a line of potentially powerful tools that unfortunately did not prove powerful in practice. The wave of environmental justice advocacy rush-

[298] Such as in the matter of Louisiana Energy Services, L.P., before the U.S. Nuclear Regulatory Commission (US NRC) Atomic Safety and Licensing Board., regarding the siting of a uranium enrichment facility in Claiborne, Louisiana. *See* Hill *Environmental Justice: Legal Theory and Practice*, p. 91-101. This preliminary injunction on environmental justice grounds was successful.

[299] Lambert, Thomas/Boerner, Christopher Environmental Inequity: Economic Causes, Economic Solutions. *Yale Journal on Regulation*, 14 1997, p. 213.

[300] The EPA's Office of Civil Rights, in 2002, have 121 claims to process and decided only one on merits. cf. Crossman.

[301] Martinez-Alier, Joan *The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation*. Edward Elgar, 2002, p. 172 For a discussion on individual U.S. States' and environmental justice Executive Orders, see Hill *Environmental Justice: Legal Theory and Practice*, p. 214-225

ing through civil rights protections, environmental regulations, and their nexus to protections against discrimination ran out its storm surge in the convoluted channels of existing legal landscape. The end of the tour then of the American protections against environmental justice shows a much less cohesive picture of protection in environmental directions extending from fundamental rights.

5.5 Summary

This chapter ends on a much lower note than the previous. The land where environmental justice got its start does not afford the same routes to protection as the similarly situated but legally very different European situation. Despite sharing the same underlying concerns the local legal landscapes afforded different paths for addressing those concerns. This chapter focused on a comparison of the fundamental rights pathways available in the U.S. that might foreseeably lend themselves application as seen in Europe. Such a fundamental rights approach was not only indicated by the introduction to the environmental justice problem given in this work but is indicated by the U.S. literature itself. Virtually from its inception environmental justice has focused on the civil rights pathways as avenues for rectification. Unfortunately, the reception of derived-EHR via U.S. civil rights and associated legal paths was not as pleasant as that of European human rights.

Civil rights and their role in anti-discrimination policy play a powerful and central role in rights discourse in the U.S. Equal protection under the law is enshrined at the constitutional level, preventing laws from varying over different classes of people. Its logic trickles down into the funding decisions of agencies of federal government through the Civil Rights Acts. The goal of the policies was first to root out latent discrimination in the U.S. but was bounded by their parallel rights to personal liberty. Therefore, the absolute wording of the constitutional protections ended up being not as absolute as an advocate might like. And the constitutional flexibility that the U.S. Court has read into the evolving U.S. terrain ended up hurting not only anti-discrimination goals but also placed a large road block in the path of expanding rights over environmental directions. Those roadblocks have crept forward by forcing the traffic once channeled down those roads to the other less tested and less cohesive legal roads like housing discrimination protection and then down the

small roads of individual regulation.

In order to fix ideas more concretely, this summary proceeds to nail down the general feeling of disappointment with the U.S.'s utilization of rights-pathways by a direct comparison with the four problems identified—and largely addressed—in Europe's discourse.[302] How did the U.S. fair in particular in addressing the fears of democratic disenfranchisement, health affects, siting concerns, and limited public empowerment?

5.5.1 Democratic Disenfranchisement: Revisited

Compared to the detailed discussions of both Article 10 of the ECHR and the Aarhus Convention, there is far less mention in the U.S. about guaranteeing rights to information and process. In fact, there is significant concern worldwide about how limitations on informations flows—both formal and informal—can affect democratic participation.[303] The European experience though puts a backstop in in the form of forcing States to provide information where necessary to allow citizens to make their own informed decisions. While, again, this right does not place structured requirements on the State to collect information they are under notice that failure to provide adequate and timely information will impact the European Court's perspective on whether they adequate met their margins of appreciation.

It is this backstop whose absence is most apparent in the U.S. literature. Both *Sandoval* and *Camden* have succeeded in placing severe restrictions on an individual's ability to check state action against its own regulations. In the abstract, it seems as though the U.S. system tells individuals not to worry about this and that the regulatory state will take care of it. Should the regulations fail there are bureaucratic methods for dealing with the shortcoming, such as administrative complaints and, ostensibly, letters to your representative. But these are precisely the democratic backstops predicted to groan weakly against issues of disproportionate environmental burdens.[304] The U.S. has sufficiently truncated personal oversight of environmental problems, relegating the outcomes to the oversight of the regulatory state and failed to notice that this is the start for environmental injustice.

[302] Sections 4.3.2.1–4.3.2.4.

[303] Kravchecnko, Svitlana The Myth of Public Participation in a World of Poverty. *Tulane Environmental Law Journal*, 33 2009

[304] Chapter 2.

While one can write another whole research study on the efficacy of these particular pathways, and whether the closing of the path inflicts in actuality any harm, the point remains that Europe guarantees access to information and, to a greater extent, deputizes individuals to police a range of environmental issues through their existing human rights. Damage is done to relative levels of protection in the U.S. simply by its single-axis attack on the problem. Not only are there no concomitant requirements toward information ends, though much talk has been had of granting public participation rights as environmental justice solutions,[305] but in the U.S. individuals are stripped currently of their powers to access the court system on grounds that would be acceptable for comment under Articles 6 and 13 of the ECHR.

These points all combine to give grave concerns for the minority's ability to influence decisions. It puts much weight on their ability to change majority opinion while it removes their ability to press change more forcefully through legal channels. This point perhaps explains the the continued discussions of grassroots power and organization in the U.S. literature.[306] Their successes notwithstanding, the question remains whether burdening the burdened, even when it can arguably wind up being a success, is justice. While a philosophical question worth addressing in later works, the mechanics of Chapter 3 predict such a victory will only be a static success anyway. Without the trickle-down mechanics of the overarching rights-focused framework, there is far less hope that a static victory could automatically translate across the many environmental justice situations into future protection against injustices.

A counter-argument that the U.S. could easily implement a positive requirement to provide for information exchange to bolster the positions of the minority does little to change the relative momentum of the two systems under comparison. In Europe, all paths are open and there is no discussion of closing down the pathways so recently expanded.[307] It is true, however, the there are major concerns within the European Court of handling caseload;[308] cases which fall through the cracks are as equally unjust as U.S. cases which never make it through the front door. Justice concerns view this as a different problem however than a lack of justice-fomenting pathways to explore.

[305] Kravchecnko2009,Fraser2005,Spyke1999,Guana1998,Foreman2000

[306] Importantly new textbooks like Hill *Environmental Justice: Legal Theory and Practice*

[307] Compare, however Alston, Philip Conjuring up New Human Rights: A Proposal For Quality Control. *American Journal of International Law*, 78 1984

[308] Janis/Kay/Bradley, p. 28.

It is this difference in momentum which seems at this point the evolution of environmental justice to be the most damaging. Protections there are clearly defined toward the problems they exist to address. Adding supplementary protections then in an environmental direction do not necessarily mix well with what is already on the table. Thus there is limited chance for deriving environmental protections and methods pressing back against environmental injustice in existing legal pathways. The landscape in Europe allows for addressing environmental justice problems without incurring the problems with sculpting a new right or new regulations. Engaging the many axes of rights-based power allows for flexibility relative to what is achievable in tuned regulations. That, in turn, enables the momentum to continue developing forward while in the U.S. it has sputtered to a stop, leaving individuals stuck either holding the pollution or the proverbial bill in setting in motion a campaign to influence the majority.

Relative to Europe then the U.S. is left with a decision to jump in an fully regulate environmental justice, as the Executive Order was perhaps hoped to do, or move in the difficult direction or re-interpreting or overturning much of their civil rights jurisprudence. Access to information is fundamental to rights themselves, as it would be to any successful grassroots campaign. Even where that information may be accessible, through agency or EPA regulations, access to the courts and successful remedy, so damaged by the new hurdles imposed on individuals leaves the U.S. in an unprotected position. To fail to do something in this direction leaves the democratic problems exposed by environmental justice unaddressed and inflicting damage on the liberal principles upon which all other foundational rights are based. Its weakness also puts more pressure on the remaining problems which a rights-based approach does address.

5.5.2 The Insufficiency of Health Problems: Revisited

Is there enough protection of personal health in the U.S. with which to derive some environmental justice protection? A derived right is, again, a protection for the natural environment that comes as a byproduct of protecting humans. Protecting the environment in its own right would be a step farther but the former is often utilized in the justice context to locate a legal requirement to protect.

This chapter focuses attention rather noticeably on the fact that legal re-

quirements are hard to come by in the American discourse. There is a requirement for polluting activities to adhere to regulatory agencies and the rules which they promulgate but there is no formal way for individuals to force compliance other than an administrative complaint. Those complaints are necessarily ex post in nature thus granting no formal forward protection even when health concerns could be proposed. Access to information is not assured nor is procedure or remedy, two related routes which could give ex ante protections via health to environmental oversight. There is no connection to protections for the home and familial connections either. Threats to life are equally going to fall under tort and possibly criminal law before they are seen under and rights-based microscope.

The most powerful complaints in the U.S. could still be brought under a discrimination heading instead of a failure-to-protect umbrella, but the former runs immediately into the problem of proving intent to discriminate. All in all this means that even appealing to health concerns for environmental ends, despite their inability to solve the democratic or spatial problems of environmental inequity, will not always possible in the U.S. This is, in a nutshell, the problem with early environmental justice cases such as *Bean*. The health/environmental nexus must sit tightly around a defined minority grouping and this has failed repeatedly to be sufficient for U.S. courts to act upon.

Here again, and above the continued problem of expanding given protections, there is the relative problem of momentum. In Europe the experience points to a strategy for environmental advocates to continue pressing existing duties under Articles 2, 8, 10, and 13 on the State. As environmental degradation continues to encroach on protected spheres one expects more cases on these levels to find fertile legal grounds before the Court. The fruits of those seeds then becomes forward protection as States become aware of the holes in their protection of fundamental rights. Thus there is a route here for forward momentum.

Because there are no similar guarantees in the U.S., nor any realistic hope for extracting protections from existing anti-discrimination paths, the insufficiency of health problems to trigger justice-type protections becomes even more glaring. If they cannot trigger protection when the group suffering a health risk is also a suspect classification then the protection that exists is limited indeed. Even as the market-minded U.S. leads the economics research in spatial agglomeration there will grow no concomitant duty to watch for

the environmental impacts of those clusters, either from the environmental quality itself or from any projected health impacts. Naturally, regulation will continue to provide basic protection of toxic pollutions. That protection has failed though to prevent the rise of the environmental justice movement and should as such not be trusted to put the brakes on disproportionate environmental burdens.

Again, none of this is to imply by negative examples that EHR or derived-rights are sufficient to protect all human health situations. There may very well remain large gaps and environmental problems. There may even be catastrophes like that in *Öneryildiz* lingering in the European lanscape. Leaving health concerns outside of human rights documents exacerbates these concerns though it limits problems with overreaching and state reluctance to add more positive duties. Nevertheless, the absolute lack of backstopping power in the U.S. to use health concerns through existing legal protections to motivate environmental safety looks glaring in comparison with Europe. *Hatton* and *López Ostra* put a duty on the State to validate their margins of appreciation as health impacts emerge. And even when those health impacts do not breach the thresholds, leaving individuals with continued exposure, there is no such backstop requirement in the U.S.

Regulations may continue to address the most grievous or politically-flammable situations in the U.S. but that does not address the environmental justice issue. The closure of individual pathways to regulatory enforcement complete the castration of the health pathways toward derived environmental protection, even though such protections would not be sufficient to prevent environmental injustice without further modifications. Combined with the lack of standing and access to information, environmental justice advocacy falls behind leaving even less pressure than before on forward momentum toward change. The U.S. literature though is most focused on problems of siting, and hopefully find more derived protections there, despite roadblocks and legal hurdles.

5.5.3 Siting and Agglomeration: Revisited

While Europe excels relative to U.S. protections in providing the backstop when one finds themselves in a tilted position, the U.S. fairs relatively better in providing protections against unfair siting. Identifying the groups within pollution agglomerations and cataloging their racial and socio-economic makeup

is what made the case for widespread injustice and pointed toward incorporating increased protections in the first place. This is therefore the area of most concentrated environmental justice inquiry in the U.S. It was only the lackluster performance in identifying magnitudes which stopped the momentum of the effort, a problem later augmented by the legal hurdles of personal standing.

The U.S. may not actively address the agglomeration issues presented at the end of Chapter 2 but they do have an assortment of protections against almost any processes which focus attention on a minority. That is, they are protections against siting and agglomerating environmental problems when that minority is actively identified as a suspect classification and that discrimination is arguably intentional. This is arguably powerful protection although in practice it has not translated to the kind of justice nor the widespread conception of equity desired by environmental justice.[309] Moving away from looking at these issues through the lens of discrimination did much to open up standing for aggrieved individuals outside of the U.S., but it is precisely the focused attention to minority issues there which make spatial siting and agglomeration more likely to find derived protections in the U.S.

But this is, at best, only the backstop which the U.S. was missing in addressing the previous two problems. And it only operates when racial minority issues are in play. The fact that this is often the case in the U.S. does not remove the fact that an entire socio-economic minority is removed from consideration even though they face arguably the same limited power to affect majority decisions as a racial minority.[310] Therefore, the remaining powers to protect minorities under §601, §1983, and associated checks placed on majority decisions by the FHA and administrative procedure reminders of the Executive Order do not protect similarly across all environmental justice situations.

That is another benefit of the derived-EHR approach that reveals itself most strongly when contrasted with the discrimination-focus in the U.S. The derived EHR approach works evenly across all citizens, focusing as it does on the individual and their rights rather than through a lens (or legal pathway) first created to rectify existing injustices between groups. Repositioning this latter rectification toward environmental ends may carry more power because of remaining moral or political repercussions where the racial problems obtain, but

[309] Even if it were to be resurrected from behind the *Sandoval* pale. See Black

[310] Where they are indeed two separate groups.

its power is more limited in scope. Therefore, while the U.S. makes up ground relative to Europe in allowing for possible environmental justice protections against (racial) minority siting and agglomeration it loses significant credit because it localizes that protection on a reduced number of people.

Also reducing the positives in U.S. based protection is the lower pressure applied from successful environmental justice cases to future instances. Because the power here works through the channel of anti-discrimination—where standing and intent issues do not come into play—there is less chance of a successful case's precedent spreading waves of change through a legal system. The same logic applies to forced changes in regulation. The State's duty here is not to prevent damage to life and livelihood but to prevent discrimination. The protection to life and livelihood in the U.S. derives from the fact that the State may be preventing damage better for the majority than for the racial minority. The Fourteenth Amendment guarantees equal protection under the law though there is not, however, a weighing of whether the State has successfully equalized in a positive sense the provision of resources.[311] If the law in and of itself is applied equally and remaining segregative effects appear afterward then protection is not assured. It is not individualized protection in the same sense as in Europe.

Therefore, the democratic underpinnings of injustice are left untouched for a group of people even when and where anti-discrimination protections do find application in environmental issues. Although they might be a group less in need of augmented protection they still are a numerical minority faced with power imbalances to push against the tilting of environmental problems caused by majority desires. In Europe, the worse the insults, the greater the obligation on the State to assure compliance with underlying rights. In the U.S. the dynamic is different. There is to be compliance across suspect classification and the majority but questions regarding the content and outcome of the situation are outside the question of protection. That leaves questions of adequate protection to be tackled in regulatory and administrative fashion, placing the public in the difficult position of raising their own voice.

[311] Except in cases of municipal service provision, an area of U.S. anti-discrimination law not touched on here. But see Hoidal; Rogers, Richard J. New York City's Fair Share Criteria and the Courts: An Attempt to Equitably Redistribute the Benefits and Burdens Associated with Municipal Facilities. *N.Y.L. Sch. J. Hum. Rts.* 12 1995.

5.5.4 The Lack of Public Empowerment: Revisited

Unfortunately, the U.S. sensitivity to a history of discrimination does not translate more power for public participation. Paradoxically, now that the §602 pathways are left unchecked by the public at large, the lack of attention to requirements of public participation leaves people even more exposed to the problems to which §601 and §602 were meant to bring attention. Again there is a hole in the blanket of protection relative to Europe's derived rights. Here it is is most glaring as it appears it is not only a hole in derived-protections but is arguably a hole in its intended protection.

What exists then to patch the hole? If there is no private right of standing to address grievances after the fact is there a way to check agency power prior to enactment? Though anti-discrimination pathways have proved less than adequate from which to derive environmental protection perhaps the U.S. can find related protections by directly allowing for individual participation. There is, however, no formal locus of empowerment for the public in environmental matters. Recall from the analogous discussion in Chapter 4 that there is full overlap between environmental justice problems and environmental human rights problems and the degree to which public empowerment serves as an improvement for one it is unambiguously beneficial for the other. In Europe, the state is given wide margins for setting up their regulatory apparatus. That apparatus must however recognize rights to receive and impart information and provide for effectual remedy within the context of other substantive rights and auxiliary commitments like those of the Aarhus Convention. There is an interconnected backstop there. Although there is a relatively wide margin for State's choice in regulating the environment and to what degree public participation is allowed or required therein, there is an overarching goal which must be maintained. Part of that maintenance is keeping a population able to check the choices. It may not necessarily be able to prevent changes in environs due to domestic exhaustion clauses but it will provide a check later and furthermore for future cases. In the U.S. however there is no such unifying principle. Individual regulations and procedures innate to administrative law do exist but to the extent that European results adequately provide environmental human rights one can expect relative protection in the U.S. to be more limited.

On the point of innate procedures there is much written on congressional

delegation of power to agencies, what power that actually moves from the democratically-bounded Congress to the unelected agencies, and what processes the agencies must take when exercising that power. Of particular note here is notice-and-comment rule making. Often an agency must look for comments on a proposed rule or regulation before that proposal can be incorporated as law. The intricacies of when and where this must occur and further how much action an individual can take to force the issue are far beyond the scope of the research.[312] Suffice it to say that when agencies are involved public participation may well be a part of the legal landscape. How much and how powerful though is a factor of many things. All of those issues need not line up behind the overarching goal of protecting fundamental rights, either. Nevertheless, the focus in the U.S. on administrative and regulatory law surrounding environmental protection does have some built-in public participation and it was necessary to mention here.[313]

There is therefore a limited amount of stopping power given to the people in any specific instance of environmental siting, usage, or pollution. Getting one's voice heard though is a struggle democratic processes necessarily must avoid. The fact that the ECHR framework makes it an *a priori* requirement to take into account a broad spectrum of impacted spheres of citizens puts this issue already in the foreground. While it might not solicit input it cannot expressly disregard the issues that might exist there and still expect to pass muster. The US approach is fundamentally different. The actions available to the people come *through* existing protocols which were put in place for

[312] For a textbook approach, see Schwartz/Corrada/Brown Jr

[313] Similar public participation regulations exist in, for example, Superfund cleanup processes. Cleanup is organized under national contingency plans and proceed through steps of site assessment, decisions on removal actions, whether or not to place the contaminated site on the national priorities list (NPL), remedial investigation and feasibility studies, and the public issuance of a plan, invites for public comment and participation, and to issue a decision. The public has a chance to speak their mind and comment as to whether the actions are suited to the circumstances.The public can also speak their mind directly through their private right to bring trial against polluters via CERCLA. Details are not discussed fully herein as they are ad hoc in nature and do not usually have binding effect. Huitema, Dave *Hazardous Decisions: Hazardous Waste Siting in the UK, The Netherlands, and Canada. Institutions and Discussions*. Dordrecht: Kluwer Academic Publishers, 2002 But compare actions by Mr. Cole as one of the only success stories in environmental justice litigation. In *El Pueblo para el Aire y Agua Limpia v. Co. of Kings* (Cal. Sup. Ct., 1991), he successfully convinced the state court that an environmental impact study had not satisfied its public participation requirement for permit siting because they neglected to translate the proceedings into Spanish, the dominant language of the affected community. Lavelle, M./Coyle, M. Unequal Protection: The racial divide in environmental law. *The National Law Journal*, 21 1992, p. S8

reasons other than allowing for personal environmental protection. The U.S. Courts have expressly been reserved about opening up new pathways with old laws. Both take a short view of administrative-foot dragging, though the U.S. remains notable resistant of enabling positive claims on the State where there are not explicit claims authorized by Congress. This, like the ECHR, does not guarantee a *specific* remedy, however, only that claims when and where they do exist are properly respected via due processes. It is therefore the desire to limit judicial readings of obligations into the constitution or congressional legislation that makes the analogous U.S. processes inherently more bounded than those afforded via the ECHR.

Again, this is the difference between guaranteeing participation and granting actual political veto power. Granting full veto power has the downside of potentially allowing too much protection and stopping environmental usage when it is actually net positive. Organizing power can grow too powerful though with the propensities illustrated herein it is within reason to think the scales of power are still significantly underweighting the desires of the masses. Discourse and dialogue should be the rule rather than political lobbying for ultimate veto power. Democratic participation after all does not dictate the best outcome but rather a more fair fight for opposing outcomes. Crafting rights and responsibilities therein are a necessary next-step in the environmental justice conversation. In the U.S. though that conversation will have to take nearly all of the pressure of the environmental justice conversation while the European experience has less equity pressure to offload on this single check on government power.

5.5.5 Summary and Thoughts on The Limited Results

This chapter aimed to illustrate exactly how ostensibly powerful canon of civil rights protections already touched on by decades of environmental justice advocates is either legally truncated or displays a rather spotty record in protection in the U.S. The record further illustrates how convoluted the pathways will be for any future attempts to link fundamental protections to environmental protection. §601 of Title VI remains open to private litigants but only those with the smoking gun of intent will be able to strike back against a discriminatory outcome. §602 is now closed to private parties, leaving the disparate impacts standards promulgated by agencies above and beyond their §601 anti-

discrimination mandate out of reach. §1983 also remains underpowered as a toehold toward remedy. Public participation is not yet guaranteed but Europe has notably taken several steps, like the Aarhus Convention, toward leveling the information playing field relative to the U.S. Neither side though has a model on which to base formal public participation procedures. In sum, however, the ability to derive protections from several axis of fundamental rights puts Europe ahead in the case for providing protection against environmental injustice, carving farther with the more flexible albeit weaker rights than the U.S. moves with the anti-discrimination blade.

The roads well traveled in the home of environmental justice literature are thus rather in need of repair, where they remain passable at all. Backroads such as administrative complaints, fair housing complaints, and petitioning for public participation remain available but auxiliary. Administrative complaints do carry some force when coupled with Executive Order 12898's reminder to federal agencies to comply with their environmental promises and mandates but only before comparing their power to the umbrella protection provided by access to remedies, courts, and information in the ECHR. It is indeed less clear how much enforcement one can pull out of the U.S. analogue pathway.

Tackling problems via connections between the housing market and discrimination is another detour but bounded in scope to minorities involved with active housing transactions; there is little forward pressure here to protect against environmental justice. That, in the end, is the most critical aspect of the illustrations here. While one might plausibly argue that the multitudes of pathways available in the U.S., though convoluted and tricky, can lead to the same positive outcomes of environmental protection for minorities as the more unified picture of fundamental protections in Europe. The minutia of such an argument would be key to winning that debate and would likely take a team of very skilled and experienced legal authorities to craft. This chapter should therefore not be viewed as a critique that the U.S. leaves citizens completely exposed to environmental justice problems. There are solutions and they can be pieced together to form protections. That they have not resulted in positive-sounding judgements thus far can be construed as a lack of adequate attempts and cases rather than a failure, generally speaking, of the law.

But even granting that such a possibility exists leaves the highest criticism unanswered; there is little to no forward pressure to change the picture. Chap-

ter 3 went to lengths to show how little evidence there is against the proposition that a freely-adjusting marketplace will aggregate environmental problems and a numerical minority—when not a racial or socio-economic minority—will be on average the recipients of such problems. The pathways available in the U.S., weak as they are, do nothing to address the future tilting of environmental problems even when they can be cobbled together in a particular situation to form some semblance of derived environmental protection.

Individual success stories are possible. The grosser the negligence or disregard for a suspect classification's situation, the more likely that becomes with the legal tools discussed above. But it will continue to be an ad hoc problem/solution dynamic. Because the connection to fundamental rights in the U.S. is not direct, and the derived protections, when they exist, necessarily flow through a lens of discrimination, there will not be the trickle-down effect that will change laws, regulations, and procedures at the levels where it matters. The decision makers will never be forced to consider the effects their actions have on the fundamental rights of those being impacted by their decisions and will only be called to check their actions when the outcomes are sufficiently out of line with certain narrowly proscribed rights. Paying lip service to environmental justice in regulations and the acknowledging the problems which result from environmental tilting without simultaneously recognizing the continued insults to basic freedoms will never move the U.S.'s legal regime forward in the direction Europe's approach moves. These situations will continue to emerge, will continue to find limited success in the courts and in the established procedural pathways available to them, and will continue to generate negative assessments of the rule of law in this area.

The following chapter concludes on this point by highlighting some of the downsides to the European approach itself. Deriving environmental protections with which to address environmental justice is, after all, not a panacea. It carries its own concomitant risks as well as covering some of the problems falling under the heading of environmental justice as approached in Chapter 2. Compared though to the approach in the U.S. though it shows far more immediate promise and completeness. At the very least, should the U.S. decide not to address environmental justice in an expanded rights manner but rather focus on optimal regulation and oversight so that the absolute levels of environmental insults result in a level of protection commensurate with fundamental dignity they should discuss this choice openly in light of the comparison con-

ducted here. That is, they will have to justify how and why those regulations are not simply the static fixes but work toward preventing the environmental justice problem in a fashion that provides the flexible safety net that the European approach has both pioneered and set in motion.

6 Environmental Justice through Derived Rights: Protection, Holes, and the Future

> By means of a global approach to these phenomena...it has become possible to move from environmental law to environmental rights...
>
> *Fatma Ksentini*

This thesis tested the hypothesis that a class of environmental problems, for some time now fomenting themselves in a broad literature as "environmental injustices," can be more completely addressed by operationalizing existing rights toward environmental ends. Operationalizing existing rights toward new ends has itself an existing literature known as derived rights or derived protections. While a testable question in and of itself, the research first took one step backward and derived the need for a fundamental rights solution from the problems concentrated environmental burdens have on underlying democratic principles. That is, before examining the utility of fundamental rights protections over the environment it was necessary to check the validity of using rights in this way. There is indeed a concern regarding the realization of the choices for the use of the environment by of a minority of the population.

The proclivity of environmental burdens to cluster is supported by both economic theory and the evidence accumulated by the environmental justice movement itself. That damage established and connected to the need for certain spheres of protection around a democratic minority, the thesis finds its primary support in the jurisprudence of the European Court of Human Rights. While they have not ventured into the creation of new environmental human

rights, the European Court has found and defined areas of derived-rights by recognizing the role which environmental quality impacts the established canon of rights. These derived rights provide significant protections for environmental injustice. Thus, the European Court has found a ready solution that addresses both instances and underlying causes of environmental injustice.

The hypothesis is further supported by the opposing reality in the United States. Though the field of environmental justice emerged inside their legal and cultural milieu which could arguably also allow for such derivations of rights, advocates there attempted instead to derive protection narrowly around anti-discrimination goals. The legal evolution was natural and understandable, given the power and history of the anti-racism struggle in the U.S. It proved however a less successful approach relative to the multi-axial dynamic overseen by the ECtHR. This lackluster response via civil rights sits on top equally disheartening regulatory outcomes and formal recognition of environmental justice problems. The comparison reveals that derived environmental rights are a more successful and more complete method—in terms of aiding the democratic foundations of society— of addressing the problems of environmental justice, but also illuminates how the underlying rights on which the derivation occurs critically impacts the protection outcomes.

In a break from the main line of environmental justice literature, this thesis located the international environmental justice literature within the wider social justice discussion to encompass different legal cultures and unmoor environmental justice from historical tethers, especially the tightly pulled line of discrimination in the U.S. Seen from this comparative perspective the environmental justice dilemma ceases to be primarily about defining metrics for measuring toxic exposure, statistical techniques for defining spatial areas, or legacies of discrimination.[1] It rather reaches the level of a human right as the struggles to deal with the problem form a democratic issue for a minority of society (Chapter 2). The propensity toward such minority impact emerges from the evidence the field of environmental justice itself has collected. Though viewing the issues as a problem for a numerical minority is different than the racially-defined minorities of early literature it nevertheless retains the picture of a globalized, industrialized economy, tuned toward distributing

[1] Though those metrics are critically important. See, for proper discussions and starting places moving forward, Liu, Feng *Environmental Justice Analysis: Theories, Methods, and Practice*. Lewis Publishers, 2001

dis-amenities in a concentrated manner (Chapter 3), placing environmental burdens among the few while spreading benefits farther and wider. To the extent that the burdened are also burdened by other social ills, such as the latent racism which so motivated the U.S. discussion, their lack of protection in environmental matters becomes quite detrimental to the exercise of their liberal rights.

This reality is implicitly recognized by the jurisprudence of the European Court on Human Rights. It also sits tightly with the social justice discussion in engaging the dialogue of the environment as a member of protected classes of goods necessary to enable capabilities.[2] Thankfully there was this existing commentary on the use of human rights to secure such environmental quality, so-called environmental human rights (Chapter 4.) which aides the exposition of what the ECtHR has accomplished. Above the theoretical discussion on the need for or the implicit existence of substantive or procedural environmental rights lies the practical application of *existing* human rights toward environmental ends, called derived or extracted environmental rights (derived-EHR). In this discussion the ECtHR figures prominently, interpreting their "living" document, the European Convention on Human Rights, to cover an environmental nexus when attributes of that environment diminish the protection of existing human rights. In this way the ECtHR's jurisprudence has both led and grounded the conversation on environmental protections as fundamental and inextricable from extant rights.

A study of the jurisprudence in Europe necessarily hits the U.S. student of environmental justice hard though. Armed with auxiliary protections spread over life, home, remedy, access to information and legal process the ECHR has stepped in to defend many situations which fall under the heading of environmental justice. Armed with fewer but arguably stronger weapons, focusing on the sharp edge of anti-discrimination law, the U.S. has failed in a similar attempt to expand existing protections to environmental attributes impacting the enjoyment of civil rights. Though no systematic barriers to positive rights exist the stricter "textual" interpretation of the U.S. Constitution join with the operation of anti-discrimination policy to make a rather tight fabric of pro-

[2] a la Nussbaum's expansions of Sen, among others. Nussbaum, Martha *Frontiers of Justice: disability, nationality, species membership*. Belknap Press, 2006; also recently expanded by Holland: Holland, Breena Justice and the Environment in Nussbaum's "capabilities approach": Why sustainable ecological capacity is a meta-capability. *Political Research Quarterly*, 61 2008.

tection with less inherent stretch than the ECHR. Because of the difference Europe has come closer to addressing the underlying worries of environmental justice and moreover revealed ways in which the underlying rights colour the emergent protections.

The thesis thus supported, the relative conclusion emerges that the U.S. needs to allow for the expansion of existing rights in a fashion similar to the ECtHR should it hope to fully address environmental justice. Moreover, their system has not kept pace with protecting the rights of minorities—numerical or otherwise—as evidence mounts about the clustering of the environmental problems from which modern society at large benefits. It is not a question of the makeup of that minority but rather the simple observation that it agglomerates, distributing benefits and burdens in different fashions. Clustered burdens, falling on a minority of the population, leaves the majority voting in favour of the dispersed benefits while the minority must organize to fight against the concentrated burdens, precisely the type of situation which merits fundamental protections.

This conclusion is walked backwards slightly with the adjective "relative" because it does not reach whether a protective outcome could not be secured in other fashions. There remains much minutia on regulation and policy to discuss before that stronger conclusion is supported as well as a discussion on how the different levels of law invoked here contribute to the end protection. The existing dialogue in the U.S. does not give much hope to a belief that regulation or policy is on a direct path toward protection, however. There is also little reason to believe that an expansion of civil rights protections in the U.S. will be forthcoming, although there do remain auxiliary protections that could be widened to protect against environmental problems. Such protections, such as against housing segregation and workplace discrimination, operate also through the lens of discrimination and are therefore remain equally unlikely to come to have the same scope as the individual-based protections of the ECHR.[3]

All of this takes place on top of an existing and well-established environmental regulatory canvas, a fact which further emphasizes the weakness of

[3]The inability of environmental justice to address non-discriminatory harm has indeed been a criticism inside its own literature. Lewis, Browne C. Changing the Bathwater and Keeping the Baby: Exploring New Ways of Evaluating Intent in Environmental Discrimination Cases. *St. Louis U. L.J.* 50 2006; Coleman, Leslie Ann It's the Thought that Counts: The Intent Requirement in Environmental Racism Claims. *St. Mary's L.J.* 25 1994.

existing lower-level approaches. The discussion here also speaks up for the idea that only an explicit environmental right will end up fully protecting the environment in the way deemed necessary by the environmental rights literature. Perhaps this way of looking at the problem opens up new methods for comparing the two methods, especially a new way to measure success.

It is after all the broad protective umbrella which makes the human rights approach so successful at encompassing the entirety of the environmental justice problem. A legislative solution does not fully come to terms with the underlying social and economic issues which continually cause problematic environmental distributions. If one accepts the economic and political premises which conspire to cause environmental injustice then a fundamental rights approach to addressing the issue becomes the only complete solution. Thus, by discussing at length the shortcomings of the established routes towards greater environmental justice expounded by traditional advocates and by coupling those shortcomings with discussions of the hard science that will be needed to shore up their weak points, the research exposes that a rights-based approach is both a more powerful and a more coherent tact for environmental justice realization.

6.1 Limits and Problems

The mission of the work was to first identify and then to defend to the reader the application of fundamental rights—human, constitutional and civil—in an environmental direction as a practical, established, and cohesive approach to protecting against environmental injustice. While the ECHR literature establishes both its practical side and introduces its cohesive nature, later revealed in relief against the U.S.'s ad hoc approaches, something remains to be said here at the end about concerns with continued expansion of the rights dialogue.

The picture in Europe is only emerging from a relatively recent and rapid expansion which cautions of problems in the future. Problems may be as simple as a reluctance of the court to continue tying their jurisprudence on environmental issues together and thereby running the risk of generating overlaps or unclarity. There is always the spectre of a wholesale inability to address the growing number of court cases. If justice is delayed or denied because of congestion, caused in whole or in part by the recent willingness to hear cases

touching on new areas of protection, then individual success in improving equity will be balanced by individual failures. This is no success at all. An argument against adding rights to the ECHR need only point to the problems in case-load already plaguing Strasbourg.[4] The willingness however of the European Court to such ideas like Pilot Cases gives at least a sense that the Court is not trying to close its doors and indeed actively working on ways to keep up with expanding numbers of claims.[5] Those experiments however are in very early stages.

Will a greater number of cases even when handled judiciously generate problems of over-reaching, overlap, or unclarity? This was a greater concern for the question of adding an explicit, substantive right.[6] If an environmental right over-reaches and falls short of its promises, it weakens the whole Convention; if the environmental overlaps with other existing rights and creates unclarity then it changes the protection landscape.[7] New rights necessitate a discussion as to overlap and, in the case of positive-minded EHRs, how to achieve broad positive obligations.[8] There is a fear that explicit broad rights may weaken the entire character of what it means to be a human right.[9]

In the context of the ECHR though this is not a new critique. Research has noted the same danger with the expansive but amorphous wording of Article 8's respect for private and family life.

> "The transformation of Article 8 into a general charter of individual autonomy is clearly fraught with difficulties. Any restraint on individual choice may be assailed as raising a possible violation of this right. Such an omnibus right is in marked contrast

[4]For a discussion, see Janis, Mark W./Kay, Richard S./Bradley, Anthony W. *European Human Rights Law.* 3rd edition. Oxford University Press, 2008, Chap. 15

[5]Ibid., p. 883-84.

[6]See discussion and notes in Section 4.1.

[7]In the limit, a case cannot be brought to Strasbourg using a Convention right with the goal or result of extinguishing a separate right. *Witzsch v. Germany*, application no. 7485/03, admissibility decision of 13 Dec. 2005 (inadmissible)

[8]Alston, Philip Conjuring up New Human Rights: A Proposal For Quality Control. *American Journal of International Law*, 78 1984.

[9]This is a general criticism of second generation rights, such as environmental rights and labor rights. The inevitable "holes" left by positive rights devalues to some extent the absolute moral position held by the original first generation rights. The general but fundamental problem in human rights theory is called the *Inferior-Urgency* objection. See Risse, Mattias A Right to Work? A Right to Leisure? Labor Rights as Human Rights. *Law & Ethics of Human Rights*, 3 2009, Nr. 1. AlsoMcCarthy2004; There are also criticisms that moving toward rights is a devolution of the purpose of the environmental justice movement. See Sze, J/London, J K Environmental Justice at the Crossroads. *Sociology Compass*, 2 2008

> to the apparently modest ambitions for this provision implied by the drafting process. The Convention, itself, may be seen as an enumeration of *particular* ways in which free choice and action are protected, and the supplementing of that specification with such a broad presumption of liberty threatens to make the other rights redundant."[10]

Overreach is thus a recognized problem when discussing either the addition of a new right or with the expansion of a single right. Perhaps though this will be less of a front-and-center concern with the enactment of the changes with Protocol 14. Streamlining and focusing the caseload of the European Court leaves less room for a multitude of cases to push and pull in different directions. Coordination will likely increase as fewer cases reach to the level of needing Chamber interpretation. Whether or not this will truncate access to the courts though and thereby restrict the otherwise positive treatment of individual access remains to be seen.

Because the court is deriving environmental protections *between* existing rights, many of the more focused concerns of overreaching are mitigated. It is arguably more pressing to address expansion of explicit rights than the expansion of implicit rights. From the jurisprudence discussed here though it is at least arguable that derived-EHRs are more of a way to smooth and connect existing rights, as well as provide full enjoyment of them, and not a manner of stretching the fabric of the rights, contributing to holes and folds. The court is completing the protection. What is being accomplished then is a derivation *between*, not a derivation on the edges. This might be an arguable point, however.

Surrounding this micro argument is the more macro thought that new rights territory can be celebrated by some while simultaneously contributing to the detriment of others. It begs notice that changing the fundamental rights landscape in any sense concretely restricts democratic options. Substantial sets of restrictions, which are as much a part of constitutional rights or human rights as their aspects of enablement, are not unambiguously democratic.[11] Human rights are meant in part to foreclose upon choices by the majority deemed rep-

[10] Janis, Mark W./Kay, Richard S./Bradley, Anthony W. *European Human Rights Law.* 3rd edition. Oxford University Press, 2008, p. 375

[11] Waldron, Jeremy A Rights-Based Critique of Constitutional Rights. *Oxford Journal of Legal Studies*, 13 1993.

rehensible and oppressive to the minority but the elevation of a principle to a "right" cannot be amended or changed by majority rule.[12] It seems that the moral question of foreclosing on a pathway to explicitly oppress a minority is quite settled and uncontroversial; foreclosing on pathways to utilize sovereign environs however is not as clear. It is implicit and imperative within the conversation on derived-EHRs then to have a narrative illustrating that their use in complementing and completing the existing canon enables democracy. After all, this was the the starting point with which this research began.

To enable the discussion but limit the democratic impact, commentators, of whom Boyle is a notable example,[13] point out that procedural rights to participation in environmental decision—procedural EHRs—are the values worthy of protection. Procedural rights are indeed already encapsulated at the highest levels of human rights organs and were touched upon herein.[14] Their flexibility seem to create less concern about overlap or unclarity than more pointed discussions in the EHR literature on adding substantive rights. Recall that the substantive rights embody many questions on qualifying thresholds and what it means to be a "good" or "livable" environment. While these are discussions that must occur if the courts continue to move forward with enunciating derived protections, it is sufficient here to say now that the ECHR jurisprudence reflecting the derived-EHRs runs parallel to the discussions on procedural right to environmental protections thus avoiding the more pointed critiques of substantive EHRs.

There is however a downside to flexibility. The less-guided expansion of multiple areas of rights and obligations under national and international law might well turn into a thicket of overlapping requirements. Such is a natural consequence of a lack of a unified approach to protecting the environment. There a substantive right would serves as an explicit goal toward which all subsequent moves, international and national, must navigate. With the courts

[12] Arneson, Richard J.; Dowding, Keith/Goodin, Robert E/Pateman, Carole, editors Chap. Democracy is not intrinsically just In Justice & Democracy. Cambridge, 2004, p. 45 Amending is possible but unlikely without great difficulty.

[13] Boyle, Alan; Idem/Anderson, Michael, editors Chap. The Role of International Human Rights Law in the Protection of the Environment In Human Rights Approaches to Environmental Protection. Clarendon, 1996; Boyle, Alan Human Rights or Environmental Rights—A Reassessment. *Fordham Envtl. L. Rev*, 18 2007.

[14] Section 4.2.4; discussing Article 10 of the ECHR and the principles enunciated in *Guerra v. Italy*, application no. 116/1996/735/932, judgement of the Grand Chamber, 19 February 1998; as well as Article 6 and Article 13. Also the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. UN Doc. ECE/CEP/43, 38 I.L.M. 717.

left plugging holes between existing rights and their environmental components there is a risk that the correct coverage may be there but it may emerge as far less efficient or even effective as a unified protection. That is, "[s]o long as environmental rights cases are brought individually, the ability to develop a systematic jurisprudence will be limited."[15] Given larger environmental concerns, including climate change and sustainability, this is indeed a significant concern to which a full-scale substantive right to environmental quality would be a more complete solution. And it is this rationale which motivates the green movement's hope to bring all entities—in the US, in Europe, and worldwide—under a codified environmental umbrella, so that they speak with one green voice. Speaking from this worldly perspective and an eye toward unification but also concern as to the potential for a continued U.S. dominance in the movement and literature, Joan Alier-Martinez notes

> [t]he environmental justice movement is potentially of great importance, provided it learns to speak not only for the minorities inside the USA but also for the majorities outside the USA (which locally are not always defined racially) and provided it gets involved in issues such as biopiracy and biosafety, or climate change, beyond local instances of pollution.[16]

And while the rest of the world could learn from the U.S.'s focus on urban environmental problems[17] the global sustainability perspective generates an overarching concern in which environmental justice plays a smaller part. After all, if the world succeeds in lowering the absolute level of pollution globally there will necessarily be fewer situations where environmental burdens breach a threshold of concern for the liberal values which generated the worry in the first place, even taking into account the ability for such burdens to accumulate within the lower absolute pollution levels. Nevertheless, with deriving protection between rights there exist already the boundaries of the existing rights to provide some guide for expansion. The full weight of the critique applies more to the difference between substantive and procedural environmental rights. Regardless, commentators have noted how human rights courts themselves

[15] Osofsky, Hari M. Learning from Environmental Justice: A New Model for International Environmental Rights. *Stan. Envtl. L. J.* 24 2005, p. 131.

[16] Martinez-Alier, Joan *The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation*. Edward Elgar, 2002, p. 14.

[17] Ibid., p. 179.

work consciously already to coordinate their approaches to evaluating human rights cases,[18] and thus generate another sort of unification pressure. Thus, the more limited discussion of derived rights avoids larger existing criticisms.

The flexibility of derived environmental protection though remains practically important to the immediate future. As a practical concern, one can easily imagine a stringent environmental treaty being too binding for ratification by enough parties, yet the existence of a right would remain empowered to some degree within derived rights.[19] Generating a green shift is not something that will come lightly in the globalized economy. The soft approach of the derived rights, despite being much less organized or powerful than substantive or procedural EHRs, remains relevant in light of short-term needs versus long-term goals even as other green advocates move toward deeper results.

And even if the derived rights might be subsumed into a larger environmental policy the rights approach retains further current relevance as both international law and the discourses of sustainability and climate change move into the international regulatory realm. The human rights focus here kept the discussion between two actors—State and individual—but the flexibility in human rights also engages non-state actors and their decisions.[20] It is these entities who are proving most difficult to regulate globally and a strong criticism of an EHR is that multinational corporations (MNC) and transnational corporations (TNC) as non-state actors could affect the environment while operating outside of human rights treaties.[21] Human rights law at this juncture must be careful then not to imply that a human right is a law that automatically governs all players and participants in the global economy but it does retain its influence on third parties in practice. This has not proved to be all too effective but may be expanding as they are recognized as the same

[18] Higgins, Rosalyn A. Babel of Judicial Voices. *Int'l & Comp. L.Q.* 55 2006.

[19] A similar view was expressed in *Flores v Southern Peru Copper Corp.,* 343 F.3d 140 (2d Cir. 2002) at 161.

[20] Section 4.1.4.

[21] "...corporations are no duty-bearers under international human rights law..." Wouters, Jan/Chanet, Leen Corporate human rights responsibility: a european perspective. *Northwestern University Journal of International Human Rights*, 6 2008, p. 16. Also "[I]t does not seem that the international human rights instruments...currently impose direct legal responsibilities on corporations." Report to the Human Rights Council of the Special Representative of the UN Secretary General on the issue of human rights and transnational corporations and other business enterprises, "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts," UN Doc A/HRC/4/035 (2007), p. 14. para 44

problems as individual governments' failures to effectuate existing rights.[22]

A flexible but recognizable degree of environmental protection through human rights can level the playing field in the short run for countries to interact with other countries' environmental decisions. That in itself can enable a shifting toward unified green norms. At the very least it is neutral to the direction of motion of larger green movements. This operates by influencing the creation of initiatives at national levels. Importantly, the existence of human right instruments has already influenced the creation of soft law and national initiatives toward bringing business conduct in line with internationally acceptable standards in areas other than environmental concerns.[23] The derived protections can now tune this toward environmental ends. For instance, if protection means simply a deterrence of the harmful activity then a finding of ineffective deterrence can heavily influence domestic law to plug holes in their legal system.[24]

This all simply says that the problems identified in the general literature on expanding rights does not apply with complete force to the continued use of derived environmental rights. This smaller discussion is already mitigated by countervailing factors such as the fact that the derivation exists between and, in some sense, underneath, existing rights. The purpose here is always to fully enable existing rights. Moreover, the approach remains relevant among other environmental goals currently in motion thus retaining value to continued discussion here. Granted, derived rights also do not give the kind of protection that those pushing for substantive rights would desire, and may fail to guarantee some of the access that an explicit procedural environmental right would lend. With the framework here, however, there are ways for future research to define more completely the necessary protections and to reduce, if not eliminate, their own deficiencies in protection.

[22] Verschuuren, Jonathan/Kuchta, Steve; Letschert, Rianne/van Dijk, Jan, editors Chap. Victims of Environmental Pollution in the Slipstream of Globalization In The New Faces of Victimhood: Globalization, Global Justice and Victim Empowerment. Springer, 2010.

[23] See Report to the Human Rights Council of the Special Representative of the UN Secretary General on the issue of human rights and transnational corporations and other business enterprises, "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts," UN Doc A/HRC/4/035 (2007).

[24] As in *X and Y v. the Netherlands*, judgment of 26 March 1985, para. 27; discussing specifically a hole in Dutch law which necessitated additional criminal law provisions as the surrounding area is covered and deterred by criminal law.

6.2 Directions for Future Research

First and foremost among directions for future work is the full incorporation of aggregative dynamics and geographical economics into the environmental justice canon. Despite the many critiques of early empirical techniques[25] these constructive criticisms have yet to make their way into the mainstream consciousness. This is first on the environmental justice-wishlist as it is entirely necessary for whatever path the discussion moves, be it continued human rights expansion, a focus on regulation, a re-empowerment of anti-discrimination legislation, or a fusion with the greater sustainability literature. Environmental justice cannot have a conversation on the spatial patterns of environmental burdens without a formal language of spatial dynamics.

This work stayed only on the very top of that dialogue, moving quickly to identify fundamental rights protections that would address the underlying democratic critique as well as the environmental problems. Even at that level though it is apparent how much impact there is to be had. With only the basic and least contentious conclusions of that literature this work was able to move solidly towards the fundamental rights discussion and away from regulation and policy. As touched on briefly in Chapter 4, understanding the ebb and flow of both business and burdens will have impacts on what it means for a State to adequately meet their positive burdens of protection. Currently it is rather easy to claim ignorance. Empowered by correct empirical techniques though will allow advocates to make more inroads with the established paths. Moreover, it is beneficial for the legal discussion as it grants sharper edges to the picture of when and where rights have been met and where questions will emerge. Naturally too, should one take issue with the conclusions of this work and desire to more into formal policy regulation the empirical work takes on a central roll both in making one's point of departure and drafting corrective policy.

Parallel to this should run a path for epidemiology and exposure research. Knowing when and where thresholds of danger are going to be important in utilizing the information economics and statistics delivers. Currently there is a dearth of information connecting exposure and risk, with approximations

[25] Most notably Bowen, William An Analytical Review of Environmental Justice Research: What Do We Really Know? *Environmental Management*, 29 January 2002, Nr. 1, Liu, Davy, Benjamin *Essential Justice: When Legal Institutions Cannot Resolve Environmental and Land Use Disputes*. Springer, 1997

forming the fulcrum of decisions. Approximations can lead to mistrust on both sides of the issue, with business interests naturally pointing to overestimates of safety and the population pointing to overestimates of risk. The problems are currently magnified by the silence of science on *interactions* and *combinations* of exposures. The vast majority of research not only is forced to approximate single toxin exposures but their interactions with other insults. Then again, some pollution is apparently benign or easily mitigated by secondary means, allowing society to enjoy benefits without localized burdens. Thankfully some of this information gather is enabled by the advent of advanced GPS and GIS systems, research that must continue at a rapid pace.[26] Such work could also help quantify what the impact of health problems is on the participation of those burdened in democratic pursuits. That is, how does pollution affect the development of liberal capabilities in a substantive sense?

With a firm foundation (re)established on the movements of people and pollution research can then add information to the Courts' decisions. This is where the bulk of research directly descending from the human rights approach must focus. As successfully admitted cases continue through the European Court the field receives more raw data as to where that particular Court finds boundaries to deriving protection. The elucidation behind those decisions will prove ample fodder for legal commentary, both within Europe but also in connection to the U.S. through the comparative approach taken here.

It is also here where legal researchers can work on showing whether the derivation process is more of a way to smooth and link existing rights or whether it is stretching the fabric of the rights and contributing to holes. What advocates of this approach would want is to show that derivation happens between and not at the edges of the convention's articles. To quote again Boyle,

> "The virtue of looking at environmental protection through other rights, such as life, private life or property, is that it focuses attention on what matters most: the detriment to important, internationally protected values from uncontrolled environmental harm. This is an approach which does not need to define such notions as a satisfactory or decent environment, falls well within the competence of human rights courts, and involves little or no potential for

[26] Starting places include Cutter, Susan *Hazards, Vulnerability, and Environmental Justice*. Earthscan, 2006, Liu

conflict with international environmental institutions. . . "[27]

That praise helped earlier to motivate the discussion on keeping EHR in a soft law or goal-oriented role, a role which allows courts to slowly expand existing rights as cultural and legal conditions permit. It's the logic that sits in the background of derived-EHR.

At some point though the growth of jurisprudence outlining where values are indeed protected will be clearly enunciated in practice. As noted, there is some mixing here of discussions on levels of law. As one of the conclusions which emerges from the comparison between the U.S. and Europe is how the underlying law dictates the derived protection, the level from which the derived protection emanates must be clarified. This is especially true if advocates start pushing the derivation process at one or another level at any time. Such progress must keep in mind too that commentators have noted already that if existing regulatory structures were strictly adhered to then there would already be this defined area of environmental rights.[28] As this is not the case, legal theory should get out ahead of the jurisprudence and find where this expansion does hit definite boundaries and where expansion of rights is an unnecessary or unwarranted overlay to the regulatory picture. That effort works to prevent overlap and unclarity, the two biggest problems with expanding rights.

Concomitant and parallel power structures must also be clarified if any court moves forward in recognizing environmental rights. There are extra-judicial channels which convey power to advocates,[29] as does the court of public opinion.[30] If one's goal is to simply protect the environment until there are no toxics then there is not need to worry about over-powering derived or substantive environmental rights. If one is concerned about environmental justice, properly bounded, or an efficient use of the environment economically described then these extra-powers need to be accounted for in a court's calculations, especially on margins of appreciation afforded. Given the prevalence of environmental justice concerns and the relative weakness of the individual against the state and, increasingly, the multi-national corporation, such tuning might be low on the practical priority list. Calling to mind though Coasian bargaining and traditional law and economics theory, optimal empowerment

[27] Boyle *Fordham Envtl. L. Rev 18 [2007]*, p. 507.
[28] Hancock, Jan *Environmental Human Rights: Power, ethics and law*. Ashgate, 2003.
[29] Branco, Manuel Couret *Economics Versus Human Rights*. New York: Routledge, 2009.
[30] Hayward, Tim *Constitutional Environmental Rights*. Oxford University Press, 2005.

may be fruitful for mainstream economics research, including economic rights work.[31] Offloading some heavy lifting from legal rhetoric while keeping the common language of this dialogue should prove fruitful for both sides.

These are all puzzle pieces which fit together to create a picture of a more environmentally just world, brought about through protecting the classical liberal sphere of individual liberty, liberty that finds itself under pressure by the modern usage of the environment. Given time, perhaps environmental justice research can illuminate exactly the necessary distributions for an equitable, habitable, and livable society. In the meantime, though, law must play the lead roll in pressing back the injustices brought down on so many by the rapid advance of globalization. Recall that it has always been the universality of the *evil* which necessitates the rights-based legal mechanisms. This is not a work extolling a universal characteristic of any environmental right. To quote Gray,

> There can be no definitive list of human rights. Rights are no theorems that fall of theories of law or ethics. They are judgments about human interests whose content shifts over time as threats to human interests change. When we ask what rights are universal, we are not inquiring after a truth that exists already. We are asking a question that demands a practical decision: Which human interests warrant universal protection?[32]

This work found a thread that leads to an acknowledgement that human's are already granting universal protection to parts of the environment. The parts protected overlap considerably, if not fully, with the pieces which environmental justice literature would traditionally like to protect. It is the European Court who has already taken the first step by acknowledging in more than words the interactions of environment and rights. The U.S. is farther behind but could quickly re-open their civil rights pathways, allowing for a more detailed discussion on the relative benefits of multi-axial and single axis derived protections. That is just another dimension of the work to come. With any luck, this work has correctly identified the tendencies and located them within the operating dynamics with which they interact, allowing for some unifying gravity. With a bit more luck, these paths for future research will

[31] I.e. Hertel, Shareen/Minkler, Lanse; Hertel, Shareen/Minkler, Lanse, editors Chap. Economic Rights: The Terrain In Economic Rights: Conceptual, Measurement and Policy Issues. Cambridge, 2007.

[32] Gray, John *Two Faces of Liberalism*. The New Press, 2000, p. 113.

elucidate those dynamics more precisely. For environmental justice research then the academic milieu remains promising. Successful continuation of work promises much for the real environment, and the people who live there, as well.

Bibliography

Abdel-Monem, Tarik: How Far Do the Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights. *J. Transnational Law & Policy*, 14 2005, 159–214

AEA Technology: Economies of Scale–Waste Management Optimisation Study. UK DEFRA, April 2007 – Technical report, available http://www.defra.gov.uk/environment/waste/localauth/pdf/economies-scale.pdf

Agyeman, Julian: Environmental Justice: From the Margins to the Mainstream. Town and Country Planning Association, 2000

Agyeman, Julian/Evans, Bob: 'Just sustainability:' the emerging discourse of environmental justice in Britian? *The Geographical Journal*, 170 June 2004, Nr. 2, 155–164

Akerloff, George: Social distance and social decisions. *Econometrica*, 65 1997, 1005–1027

Åkermark, Sia Spiliopoulou: The Limits of Pluralism–Recent Jurisprudence of the European Court of Human Rights with Regard to Minorities: Does the Prohibition of Discrimination Add Anything? *Journal of Ethnopolitics and Minority Issues in Europe*, 3 2002, 1–24

Alkema, Evert Albert; Matscher, Franz/Petzold, Herbert, editors: Chap. The third-party applicability or "Drittwirkung" of the European Convention on Human Rights In Protecting Human Rights: The European Dimension. Carl Heymanns Verlag KG, 1990, 33–45

Alston, Philip: Conjuring up New Human Rights: A Proposal For Quality Control. *American Journal of International Law*, 78 1984, 607–621

Alston, Philip; Idem, editor: Chap. The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accomodate Non-State Actors? In Non-State Actors and Human Rights. Oxford University Press, 2005, 3–36

American Lung Association: Urban Air Pollution and Health Inequalities. *Environmental Health Perspectives*, 109 2001, 357–74

Ammons, David N: Municipal Benchmarks: Assessing local performance and Establishing Community Service Standards. 2nd edition. Sage, 2001

Anderson, Frederick R./Miller, Alan S.; Husimi, Kodi, editor: Chap. Fundamental Rights and Environmental Quality In Science for Better Environment Fundamental Rights and Environmental Quality: Proceedings of the International Congress on the Human Environmental. Pergamon Press, 1977, 825–841

Anderson, Michael/Boyle, Alan, editors: Human Rights Approaches to Environmental Protection. Clarendon, 1996

Anderson, Michael R.; Boyle, Alan/Anderson, Michael, editors: Chap. Human Rights Approaches to Environmental Protection: An Overview In Human Righs Approaches to Environmental Protection. Clarendon, 1996, 1–24

Anderson Jr., Robert J./Crocker, Thomas D.: Air Pollution and Residential Property Values. *Urban Studies*, 8 Oct. 1971, 171–180

Anderton, D.L./Oakes, J.M./Egan, K.L.: Environmental Equity in Superfund: Demographics of the discovery and prioritization of abandoned toxic sites. *Evaluation Review*, 21 1997, Nr. 1, 3–26

Anderton, Douglas L.: Environmental Equity: The Demographics of Dumping. *Demography*, 31 1994, 229–248

Andreen, William L.: Defusing the "Not in My Back Yard" Syndrome: An Approach to Federal Preemption of State and Local Impediments to the Siting of PCB Disposal Facilities. *North Carolina Law Review*, 63 1985, 811–847

Arcioni, Elisa/Mitchell, Glenn: Environmental Justice in Australia. *Environmental Politics*, 14 2005, Nr. 3, 363–379

Arneson, Richard J.; Dowding, Keith/Goodin, Robert E/Pateman, Carole, editors: Chap. Democracy is not intrinsically just In Justice & Democracy. Cambridge, 2004, 40–58

Arrow, Kenneth: The economic implications of learning by doing. *Review of Economic Studies*, 29 1962, 155–173

Asch, Peter/Seneca, Joseph J.: Some Evidence on the Distribution of Air Quality. *Land Economics*, 54 1978, Nr. 3, 278–297

Ayres, Ian: Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts are Unjustified. *Cal. L. Rev*, 95 2007, 669–720

Baden, Brett M./Noonan, Douglas S./Turaga, Rama Mohana: Scales of Justice: Is there a Geographic Bias in Environmental Equity Analysis. *Journal of Environmental Planning and Management*, 50 2007, Nr. 2, 163–185

Bakker, Walbert J./Harris, Isaac S./Mak, Tak W.: FOXO3a Is Activated in Response to Hypoxic Stress and Inhibits HIF1-Induced Apoptosis via Regulation of CITED2. *Molecular Cell*, 28 December 28 2007, 941–953

Barry, Brian: Why Social Justice Matters. Polity Press, 2005

Bastmeijer, Kees/Verschuuren, Jonathan: Chap. NGO-Business Collaborations and the Law: Sustainability, Limitations of Law, and the Changing Relationship between Companies and NGOs In Corporate Social Responsibility, Accountability, and Governance: Global Perspectives. Greenleaf Publishing, 2005, 314–329

Bates, Laurie J./Santerre, Rexford E.: The Public Demand for Open Space: The Case of Connecticut Communities. *Journal of Urban Economics*, 50 July 2001, Nr. 1, 97–111

Baugh, Joyce A.: African-Americans and the Environment. *Policy Studies Journal*, 19 Spring 1991, Nr. 2, 182–191

Baumol, William J/Oates, Wallace E: The Theory of Enviromental Policy. Cambridge University Press, 1998

Beauchamp, Dan E.; Hofrichter, Richard, editor: Chap. Public Health as Social Justice In Health and Social Justice. John Wiley and Sons, 2003, 267–285

Becker, Gary S.: A Theory of Competition Among Pressure Groups for Political Influence. *The Quarterly Journal of Economics*, 98 August 1983, Nr. 3, 371–400

Been, Vicki: What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undersirable Land Uses. *Cornell Law Review*, 78 September 1993, Nr. 1001, 1001–1085

Been, Vicki: Compensated Siting Proposals: Is It Time to Pay Attention? *Fordham Urb. L.J.* 21 1994, 787–826

Been, Vicki: Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics? *The Yale Law Journal*, 103 1994, Nr. 6, 1383–1422

Been, Vicki: Analyzing Evidence of Environmental Justice. *Journal of Land Use & Environmental Law*, 11 1995, Nr. 1, 1–28

Been, Vicki/Gupta, Francis: Coming to the Nuisance or Going to the Barrios? A Longitudinal analysis of environmental justice claims. *Ecology Law Quarterly*, 24 1997, 1–56

Beetham, David: What future for economic and social rights? *Political Studies*, 43 1995, Nr. 4, 41–60

Benford, Robert; Pellow, David/Brulle, Robert, editors: Chap. The Half-Life of the environmental justice frame: Innovation, diffusion, and stagnation In Power, Justice, and the Environment. Cambridge, 2005, 37–54

Berry, Brian J.L./Caris, Susan: The social burdens of environmental pollution: a comparative metropolitan data source. Cambridge, MA: Ballinger Pub. Co., 1977

Berry, Mary Frances: Why ERA Failed: Politics, Women's Rights, and the Amending Process of the Constitution. Indiana University Press, 1988

Beve, C A/Brent, K M/Picou, S J: Environmental justice and toxic exposure: Towards a spatial model of physical health and psychological well-being. *Social Science Research*, 36 2007, 48–67

Birnie, Patricia/Boyle, Alan: International Law & The Environment. 2nd edition. Oxford, 2002

Black, Derek: Picking up the Pieces after Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact. *N.C. L. Rev*, 81 2003, 356–391

Blackburn, Robert/Polakiewicz, Jorq, editors: Fundamental Rights in Europe: The ECHR and its Member States, 1950-2000. Oxford University Press, 2002

Bleich, Erik: Antiracism without Races. Politics and Policy in a "Color-Blind" State. *French Politics, Culture and Society*, 18 2000, Nr. 3, 48–74

Bleich, Erik: Race Politics in Britain and France: Ideas and Policymaking since the 1960s. Cambridge: Cambridge University Press, 2003

Blomquist, Glenn: The Effect of Electric Utility Power Plant Location on Area Property Value. *Land Economics*, 50 February 1974, Nr. 1, 97–100

Blumrosen, Alfred W./Blumrosen, Ruth G.: Intentional Job Discrimination–New Tools for Our Oldest Problem. *U. Mich. J. L. Reform*, 37 2004, 681

Bodansky, Daniel: Climate Change and Human Rights: Unpacking the Issues. *Georgia Journal of International and Comparative Law*, 38 2010, 511

Boehm, Thomas P./Ihlanfeldt, Keith R.: Residential Mobility and Neighborhood Quality. *Journal of Regional Science*, 26 May 1986, Nr. 2, 411–424

Boerner, Christopher/Lambert, Thomas: Environmental Injustice. *Public Interest*, 118 1995, 61–82

Boerner, Christopher/Lambert, Thomas A.: Environmental Inequity: Economic Causes, Economic Solutions. Policy Study, 1995 – Technical report

Bolte, Gabriele/Kohlhuber, Martina: PINCHE Project: Final Report WP5 Socioeconomic Factors. Arnhem, 2005 – Technical report

Bolte, Gabriele/Mielck, Andreas: Umweltgerechtigkeit. Die soziale Verteilung von Umweltbelastungen. Juventa, 2004

Bothe, Michael; Bosselmann, Klaus/Richardson, Benjamin J., editors: Chap. Economic Instruments for Environmental Protection: Introduction to the European Experience In Environmental Justice and Market Mechanisms. Kluwer International, 1999, 251–256

Bowen, William: An Analytical Review of Environmental Justice Research: What Do We Really Know? *Environmental Management*, 29 January 2002, Nr. 1, 3–15

Bowen, William/Haynes, Kingsley E.: The Debate Over Environmental Justice. *Social Science Quarterly*, 81 September 2000, Nr. 3, 892–894

Bowen, William/Wells, Michael V: The Politics and Reality of Environmental Justice Research: A History and Considerations for Public Administrators and Policymakers. *Public Administration Review*, 62 2002, Nr. 6, 688–698

Bowen, William M: Comments on "Every Breath You Take...": The Demographics of Toxic Air Releases in Southern California. *Economic Development Quarterly*, 13 1999, Nr. 2, 124–134

Bowen, William M: Environmental Justice through research-based decision making. Garland Publishing Taylor & Francis Group, 2001

Bowen, William M/Atlas, Mark/Lee, Sugie: Industrial Agglomeration and the Regional Scientific Explanation of Perceived Environmental Injustice. *Annals of Regional Science*, 43 December 2008, Nr. 4, 1013–1031

Bowen, William M./Salling, Mark J.: Toward Environmental Justice: Spatial equity in Ohio and Cleveland. *Annals of the Association of American Geographers*, 85 1995, Nr. 4, 641–664

Bowen, William M./Wells, Michael V.: The Politics and Reality of Environmental Justice: A History and Considerations for Public Administrators and Policy Makers. *Public Administration Review*, 62 Nov/Dec 2002, Nr. 6, 688–698

Boyle, Alan; Idem/Anderson, Michael, editors: Chap. The Role of International Human Rights Law in the Protection of the Environment In Human Rights Approaches to Environmental Protection. Clarendon, 1996, 43–69

Boyle, Alan: Human Rights or Environmental Rights—A Reassessment. *Fordham Envtl. L. Rev*, 18 2007, 471–511

Boyle, Melissa A./Kiel, Katherine A.: A Survey of House Price Hedonic Studies of the Impact of Environmental Externalities. *Journal of Real Estate Literature*, 9 2001, Nr. 2, 116–44

Brakman, Steven/Garretsen, Harry/van Marrewijk, Chalres: The New Introduction to Geographical Economics. 2nd edition. Cambridge: Cambridge University Press, 2009

Branco, Manuel Couret: Economics Versus Human Rights. New York: Routledge, 2009

Brems, Eva: Human Rights: Minimum and Maximum Perspectives. *Human Rights Law Review*, 9 2009, 349–372

Brest, Paul: Forward: In Defense of the Antidiscrimination Principle. *Harvard Law Review*, 90 1977, Nr. 1, 1–54

Brimblecombe, Peter: The big smoke: a history of air pollution in London since medieval times. Methuen, 1987

Brion, Denis J.: An Essay on LULU, Nimby, and the Problem of Distributive Justice. *Boston College Environmental Affairs Law Review*, 15 1988, 437–503

Brown, Alice L./Lyskowski, Kevin: Environmental Justice and Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act). *Va. Envtl. L. J.* 14 1995, 741–756

Brulle, Robert J./Pellow, David N.: Environemental Justice: Human Health and Environmental Inequalities. *Annual Review of Public Health*, 27 2006, 103–24

Bullard, Robert D.: Solid Waste Sites and the Black Houston Community. *Sociological Inquiry*, 1983 In **Bullard/Wright:** Phylon 47 [1986]

Bullard, Robert D.: Endangered Environs: The Price of Unplanned Growth in Boomtown Houston. *California Sociologist*, 7 1984, Nr. Summer, 84–102

Bullard, Robert D.: Dumping in Dixie: Race, class and environmental quality. Boulder: Westview Press, 1990

Bullard, Robert D.: Confronting Environmental Racism: Voices from the Grassroots. South End Press, 1993

Bullard, Robert D.: Environmental Racism and "Invisible" Communities. *West Virginia Law Review*, 96 1994, 1037–1050

Bullard, Robert D.: Environmental Justice: It's More Than Waste Facility Siting. *Social Science Quarterly*, 77 1996, Nr. 3, 493–499

Bullard, Robert D.: The Quest for Environmental Justice. Sierra Club Books, 2005

Bullard, Robert D./Tryman, D. L.: Competition for Decent Housing: A Focus on Housing Discrimination Complaints in a Sunbelt City. *Journal of Ethnic Studies*, 7 Winter 1980, 52–63

Bullard, Robert D./Wright, Beverly Hendrix: The Politics of Pollution: Implications for the Black Community. *Phylon*, 47 1986, Nr. 1, 71–78

Buzzelli, Michael: Bourdieu does environmental justice? Probing the linkages between population health and air pollution epidemiology. *Health and Place*, 13 March 2007, Nr. 1, 3–13

Buzzelli, Michael: Spatio-temporal Perspectives on Air Pollution and Environmental Justice in Hamilton, Canada 1985-1996. *Annals of the Association of American Geographers*, 93 2003, Nr. 3, 557–573

Buzzelli, Michael/Veenstra, Gerry: New approaches to researching environmental justice: Combining critical theory, population health and geographical information sciences. *Health and Place*, 13 March 2007, Nr. 1, 1–2

Callan, Scott J./Thomas, Janet M.: Economies of Scale and Scope: A Cost Analysis of Municipal Solid Waste Services. *Land Economics*, 77 November 2001, Nr. 4, 548–560

Cameron, James/Mackenzie, Ruth; Boyle, Alan/Anderson, Michael, editors: Chap. Access to Environmental Justice and Procedural Rights in International Institutions In Human Rights Approaches to Environmental Protection. Clarendon, 1996, 129–152

Campbell, Andrew L.: Can Federal Regulations *Ever* Create Federal Rights Privately Enforceable Under Section 1983? *Ind. L. Rev.* 38 2005, 727–760

Campbell, Donald T./Stanley, Julian C.: Experimental and Quasi-experimental Designs for Research. Houghton Mifflin Company, 1963

Carson, Rachel: Silent Spring. Boston: Houghton Mifflin, 1962 (2002)

Chakraborty, Jayajit: Acute Exposure to Extremely Hazardous Substances: An Analysis of Environmental Equity. *Risk Analysis*, 21 2001, 883–895

Chalmers, Helen: Policy Profile: Addressing Environmental Inequalities through UK Research and Policy. *European Environment*, 15 2005, 374–390

Chavis Jr., Benjamin F.; Bullard, Robert D., editor: Chap. Foreword to Confronting Environmental Racism: Voices from the Grassroots In Confronting Environmental Racism: Voices from the Grassroots. South End Press, 1993, 3–6

Checker, Melissa: Polluted Promises. New York University Press, 2005

Cody, Brendan: South Camden Citizens in Action: Siting Decisions, Disparate Impact Discrimination, and Section 1983. *Ecology L.Q.* 29 2002, 231–262

Coenen, F. D./Halfacre, A.: De verdeling van milieueffecten en milieurisico's over de Nederlandse bevolking als beliedsprobleem: 'Environmental injustice' in Nederland. *Beleidswetenschap*, 14 2000, 316–339

Cole, Luke W.: Empowerment as the Key to Environmental Protection. *Ecology Law Quarterly*, 19 1992, 619–683

Cole, Luke W.: Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964. *Journal of Environmental Law and Litigation*, 9 1994, 309–398

Cole, Luke W.: Environmental Justice Litigation: Another Stone in David's Sling. *Fordham Urban Law Journal*, 21 1994, 523–545

Cole, Luke W.: Environmental Justice and Entrepreneurship: Pitfalls for the Unwary. *Western New England Law Review*, 31 2009, 601–610

Coleman, Leslie Ann: It's the Thought that Counts: The Intent Requirement in Environmental Racism Claims. *St. Mary's L.J.* 25 1994, 447–492

Collin, Robert W.: Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice. *J. Envtl. L. & Litig.* 9 1994, 121–

Colopy, James H.: The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964. *Stan. Envrtl. L.J.* 13 1994, 125–189

Combes, Pierre-Philippe/Mayer, Thierry/Thisse, Jacques-Françios: Economic Geography: The integration of regions and nations. Princeton University Press, 2008

Copeland, Brian R./Taylor, M. Scott: Trade, Growth, and the Environment. *Journal of Economic Literature*, 42 March 2004, Nr. 1, 7–71

Core, Lisa S.: Alexander v. Sandoval: Why a Supreme Court Case about Driver's Licenses Matters to Environmental Justice Advocates. *B.C. Envtl. Aff. L. Rev.* 30 2003, 191–242

Costanza, Robert: An Introduction to Ecological Economics. CRC Press, 1997

Council of Europe: Implementing Judgements of the European Court of Human Rights. Strasbourg, 18 September 2006 (Doc. 11020). – Technical report

Council of Europe: Manual on human rights and the environment. Council of Europe Publishing, 2006

Council on Environmental Quality, editor: The Second Annual Report of the Council on Environmental Quality. Council on Environmental Quality, 1971

Council on Environmental Quality (CEQ): Environmental Justice Guidance under the National Environmental Policy Act. Washington, D.C., 1997 – Technical report

Cousins, Ken: Smoke in the Skies, Bread on the Table. College Park, MD, 2001 – Technical report

Crawford, Colin; Gerrard, Michael B., editor: Chap. Other Civil Rights Titles In The Law of Environmental Justice. American Bar Association, 1999, 69–102

Crossman, Brian: Ressurrecting Environmental Justice: Enforcement of EPA's Disparate-Impact Regulations through Clean Air Act Citizens Suits. *B.C. Envtl. Aff. L. Rev.* 32 2005, 599–642

Cutter, Susan: Hazards, Vulnerability, and Environmental Justice. Earthscan, 2006

Cutter, Susan L: Race, Class, and Environmental Justice. *Progress in Human Geography*, 19 1995, Nr. 1, 111–122

Cutter, Susan L.: Issues in Environmental Justice Research. *Proceedings, Third National Conference on GIS and Public Health*, 3 1999, 525–531

Cutter, Susan L./Holm, Danika/Clark, Lloyd: The Role of Geographic Scales in Monitoring Environmental Justice. *Risk Analysis*, 16 1996, Nr. 4, 517–526

Dahl, Robert A.: A Preface to Democratic Theory. University of Chicago Press, 1956

Daly, Herman: Ecological Economics and Sustainable Development, Selected Essays of Herman Daly. Edward Elgar, 2008

Davant IV, Charles: Sorcerer or Sorcerer's Apprentice: Federal Agencies and the Creation of Individual Rights. *Wis. L. Rev*, 2003 2003, 613–658

Davies, Lincoln L.: Lessons for an Endangered Movement: What A Historical Juxtaposition of the Legal Response to Civil Rights and Environmentalism has to Teach Environmentalists Today. *Envtl. L.* 31 2001, 229–370

Davis, Mike: Ecology of Fear: Los Angeles and the Imagination of Disaster. Vintage, 1999

Davy, Benjamin: Essential Justice: When Legal Institutions Cannot Resolve Environmental and Land Use Disputes. Springer, 1997

De Schutter, O; Alston, Philip, editor: Chap. The Accountability of Multinationals for Human Rights Violations in European Law In Non-State Actors and Human Rights. Oxford University Press, 2005, 491–512

Déjeant-Pons, Maguelonne/Pallemaerts, Marc: Human rights and the environment. Council of Europe Publishing, 2002

DeMerieux, Margaret: Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Oxford J Legal Studies*, 21 2001, Nr. 3, 521–561

Desgagné, Richard: Integrating Environmental Values into the European Convention on Human Rights. *American Journal of International Law*, 89 1995, 263–294

Diamond, Peter A./Hausmann, Jerry A.: Contingent Valuation: Is Some Number Better than No Number? *The Journal of Economic Perspectives*, 8 Autumn 1994, Nr. 4, 45–64

Dijkstra, Bouwe R/de Vries, Frans P: Location choice by households and polluting firms: An evolutionary approach. *European Economic Review*, 50 2006, 425–446

Dommen, Caroline: Claiming Environmental Rights: Some Possibilities Offered by the United Nations' Human Rights Mechanisms. *Georgetown International Environmental Law Review*, 11 1998, 1–48

Dommen, Caroline; Picolotti, Romina/Taillant, Jorge Daniel, editors: Chap. How Human Rights Norms Can Contribute to Environmental Protection In Linking Human Rights and the Environment. University of Arizona Press, 2003, 105–118

Donnelley, Jack/Whelan, Daniel J.: The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight. *Human Rights Quarterly*, 29 2007, 908–949

Donnison, David: Act Local: Social Justice from the Bottom Up. Commission on Social Justice, 1994 (13). – Discussion Paper

Dowding, Keith; Idem/Goodin, Robert E/Pateman, Carole, editors: Chap. Are Democractic and Just Instutions the Same? In Justice & Democracy. Cambridge, 2004, 25–39

Dowding, Keith/Goodin, Robert E/Pateman, Carole; Dowding, Keith/Goodin, Robert E/Pateman, Carole, editors: Chap. Introduction: between justice and democracy In Justice & Democracy. Cambridge, 2004, 1–24

Downey, Liam: Environmental Injustice: Is race or income a better predictor? *Social Science Quarterly*, 79 December 1998, Nr. 4, 766–778

Downs, Anthony: The Issue-Attention Cycle and the Political Economy of Improving our Environment. In Royer Lectures at the University of California, Berkeley. Volume April 13-14, 1970

Dröge, Cordula: Positive Verpflichtungen der Staaten in der Europischen Menschenrechtskonvention. Max-Planck-Institute für ausländsiches öffentliches Recht und Völkerrecht, 2003

Dunion, Kevin: Troublemakers. The Struggle for Environmental Justice in Scotland. Edinburg Universitz Press, 2003

Dworkin, Richard: Taking Rights Seriously. Harvard University Press, 1978

Eastland, Keith E.: Environmental Justice and the Spending Power: Limits on Using Title VI and §1983. *Notre Dame. L. Rev.* 77 2002, 1601–1646

Ebbesson, Jonas; Idem/Okowa, Phoebe, editors: Chap. Introduction: dimensions of justice in environmental law In Environmental Law and Justice in Context. Cambridge, 2009, 1–36

Ebbesson, Jonas/Okowa, Phoebe, editors: Environmental Law and Justice in Context. Cambridge, 2009

Eide, Asbœrn/Krause, Catarina/Rosas, Allan, editors: Economic, Social and Cultural Rights: A Textbook. Martinus Nijhoff, 2001

Eisenberg, Theodore: Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication. *N.Y.U. L. Rev.* 52 1977, 36–171

Eisenberg, Theodore/Johnson, Sheri Lynn: The Effects of Intent: Do we know how legal standards work? *Cornell Law Review*, 76 1991, 1151–1197

Elvers, Horst-Dietrich/Gross, Matthias/Heinrichs, Harald: The Diversity of Environmental Justice: Towards a European Approach. *European Societies*, 10 2008, 835–856

Evans, Jill E.: Challenging the Racism in Environmental Racism: Redefining the Concept of Intent. *Arizona Law Review*, 40 1998, 1219–1303

Faber, Daniel; Faber, D., editor: Chap. The Political Ecology of American Capitalism: New Challenges for the environmental justice movement In The Struggle for Ecological Democracy: The Environmental Justice Movement in the United States. Guildford, 1998, 27–59

Faber, Daniel: Capitalizing on Environmental Injustice: the polluter-industrial complex in the age of globalization. Rowman and Littlefield, 2008

Faerstein, Brian: Resurrecting Equal Protection Challenges to Environmental Inequity: A Deliberately Indifferent Optimistic Approach. *U. Pa. J. Const. L.* 7 2005, 561–590

Fahsbender, John J.: An Analytical Approach to Defining the Affected Neighborhood in the Environmental Context. *New York University Environmental Law Journal*, 5 1996, 120–180

Faramelli, Norman T.; Barbour, Ian G., editor: Chap. Ecological Responsibility and Economic Justice In Western Man and Environmental Ethics. Addison-Wesley Publishing, 1973, 188–203

Fawcett, J.E.S.: The Application of the European Convention on Human Rights. 2nd edition. Oxford University Press, 1987

Ferguson, Niall: The Cash Nexus: Money and Power in the Modern World, 1700-2000. Basic Books, 2001

Ferguson, Niall: The Ascent of Money: A Financial History of the World. Penguin Two, 2008

Fisher, Joshua B./Kelly, Maggi/Romm, Jeff: Scales of Environmental Justice: Combining GIS and spatial analysis for air toxics in West Oakland, California. *Health and Place*, 12 December 2006, Nr. 4, 701–714

Fleischacker, Samuel: A Short History of Distrubive Justice. Harvard University Press, 2004

Fletcher, Brian M: Environmental Equity or environmental discrimination: An assessment of hte New York State Inactive Hazardous Waste Disposal Program. Ph. D thesis, State University of New York at Binghampton, 2003

Foreman Jr., Christopher H.: The promise and peril of environmental justice. Brookings Institution Press, 1998

Forsythe, Ian: A guide to civil rights liability under 42 U.S.C §1983: An Overview of Supreme Court and Eleventh Circuit Precedent. website

Foster, Sheila: Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement. *California Law Review*, 86 1998, 775–841

Foster, Sheila R.: Causation in Antidiscrimination Law: Beyond Intent Versus Impact. *Hous. L. Rev.* 41 2005, 1469–1548

Fraser, Leah Marie: Participation and policy: A case study of environmental justice government-social movement interaction. Ph. D thesis, University of California, Irvine, 2005

Freeman III, A. M.; Kneese, A. V./Bower, B. T., editors: Chap. Distribution of environmental quality In Environmental Quality Analysis: Theory and Method in the social sciences. The Johns Hopkins Press, 1972, 243–278

Freeman III, A. Myrick: On Estimating Air Pollution Control Benefits from Land Value Studies. *Journal of Environmental Economics and Management*, 1 1974, 74–83

Freeman III, A. Myrick: Hedonic Prices, Property Values and Measuring Environmental Benefits: A Survey of the Issues. *The Scandinavian Journal of Economics*, 81 1979, Nr. 2, 154–173

Freeman III, A. Myrick: The Measurements of Environmental and Resource Values: Theory and Methods. 2nd edition. Washington, D.C.: Resources for the Future, 2003

Fujita, Masahisa/Krugman, Paul/Venables, Anthony J.: The Spatial Economy: Cities, Regions, and International Trade. The MIT Press, 1999

Fujita, Masahisa/Thisse, Jacques-Fran cois; Huriot, Jean-Marie/ Thisse, Jacques-Fran cois, editors: Chap. The Formation of Economic Agglomerations: Old Problems and New Perspectives In The Economics of Cities. Cambridge, 2000, 3–73

Galalis, David J.: Environmental Justice and Title VI in the Wake of Alexander v. Sandoval: Disparate-Impact Regulations Still Valid Under Chevron. *B.C. Envt. Aff. L. R.* 31 2004, 61–101

Galster, Goerge C.: Nuclear power plants and residential property values: A commentary on short-run versus long-run considerations. *Journal of Regional Science*, 26 1986, Nr. 4, 803–808

Gamble, Hays B./Downing, Roger H.: Effects of Nuclear Power Plants on Residential Property Values. *Journal of Regional Science*, 22 1982, Nr. 4, 457–478

Gandy, M: Concrete and Clay: Reworking Nature in New York City. Cambridge, 2002

Gardner, Dan: Risk: The Science and Politics of Fear. McClelland and Stewart, 2008

Gast, Kristen Marttila: Environmental Justice and Indigenous Peoples in the United States: An International Human Rights Analysis. *Transnational Law & Contemporary Problems*, 14 2005, 253–280

Geddes, Andrew/Guiraudon, Virginie: Britain, France, and EU Anti-discrimination Policy: The Emergence of an EU Policy Paradigm. *West European Politics*, 27 2004, 334–353

Gelobter, Michael; Bryant, Bunyan I./Mohai, Paul, editors: Chap. Toward a Model of "Environmental Discrimination" In Race and the Incidence of Environmental Hazards: A Time for Discourse. Westview, 1992, 64

Gerrard, Michael B./Foster, Sheila R., editors: The Law of Environmental Justice. 2nd edition. American Bar Association, 2008

Gerry, Alison: Case Comment Öneryildiz v Turkey. *European Human Rights Law Review*, 2 2005, 203–212

Geschwind, Sandra A.: Risk of Congenital Malformations Associated with Proximity to Hazardous Waste Sites. *American Journal of Epidemiology*, 135 1992, Nr. 11, 1197–1207

Gianessi, Leonard P/Peskin, Henry M/Wolff, Edward: The Distributional Effects of Uniform Air Pollution Policy in the United States. *The Quarterly Journal of Economics*, 93 May 1979, Nr. 2, 281–301

Glennon, Robert: Unquenchable: America's Water Crisis and What to Do About It. Island Press, 2009

Gomien, Donna: Short Guide to the European Convention on Human Rights. Council of Europe, 2005

Gomien, Donna/Harris, David/Zwaak, Leo: Law and practice of the European Convention on Human Rights and the European Social Charter. Council of Europe Publishing, 1996

Goodman, Allen C.: A Comparison of Block Group and Census Tract Data in a Hedonic Housing Price Model. *Land Economics*, 53 November 1977, Nr. 4, 4483–487

Gormley, W. Paul: Human Rights and Environment: The Need for International Co-operation. A.W. Sijthoff, 1976

Gorod, Brianne J.: The Sorcerer's Apprentice: Sandoval, Chevron, and Agency Power to Define Private Rights of Action. *Yale L. J.* 113 2004, 939–946

Gover, Kevin/Walker, Jana L.: Escaping Environmental Paternalism: One Tribe's Approach to Developing a Commercial Waste Disposal Project in Indian Country. *U. Colo. L. Rev.* 63 1992, 933–943

Gray, John: Hayek on Liberty. Basil Blackwell, 1984

Gray, John: Two Faces of Liberalism. The New Press, 2000

Gray, John: False Dawn: The Delusions of Global Capitalism. Granta Books, 2002

Greaves, Mel: Cancer: The Evolutionary Legacy. Oxford University Press, 2001

Green, Tristin K.: Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory. *Harv. C.R.-C.L. L. Rev.* 38 2003, 91–157

Greer, Steve: The European Convention on Human Rights: Achievements, Problems, and Perspectives. Cambridge University Press, 2007

Griliches, Zvi: Price Indexes and Quality Change. Cambridge, MA: Harvard University Press, 1971

Grossman, Gene M/Helpman, Elnhanan: Special Interest Politics. MIT Press, 2001

Guana, Eileen: The Environmental Justice Misfit: Public Participation and the Paradigm Paradox. *Stan. Envtl. L. J.* 17 1998, 3–72

Guill, Terenia Urban: Environmental Justice Suits Under the Fair Housing Act. *Tul. Envtl. L.J.* 12 1999, 189–234

Haab, Timothy C./McConnell, Kenneth E.: Valuing Environmental and Natural Resources: The Economics of Non-Market Valuation. Edward Elgar, 2002

Hall, B./Kerr, M. L.: 1991-1992 Green Index: A State-by-State Guide to the Nation's Environmental Health. Island Press, 1991

Hamilton, James T.: Politics and Social Costs: Estimating the Impact of Collective Action on Hazardous Waste Facilities. *The RAND Journal of Economics*, 24 Spring 1993, Nr. 1, 101–125

Hamilton, James Towler: Politics and Social Cost: Hazardous waste facilities in a truly Coasian world. Ph. D thesis, Harvard University, 1991

Hancock, Jan: Environmental Human Rights: Power, ethics and law. Ashgate, 2003

Handl, G; Eide, A/Krause, C/Rosas, A, editors: Chap. Human Rights and the Protection of the Environment In Economic, Social, and Cultural Rights. Kluwer, 2001, 303–328

Handl, Günther; Trinidade, Antonio, editor: Chap. Human Rights and the Protection of the Environment: A Mildly "Revisionist" View In Human Rights, Sustainable Development and the Environment. 1992, 117

Hanemann, W. Michael: Valuing the Environment Through Contingent Valuation. *The Journal of Economic Perspectives*, 8 Autumn 1994, Nr. 4, 19–43

Harrison, David/Rubinfeld, Daniel L.: Hedonic housing prices and demand for clean air. *Journal of Environmental Economics and Management*, 5 1978, Nr. 1, 81–102

Harrison Jr., David/Rubinfeld, Daniel L.: The distribution of benefits from improvents in urban air quality. *Journal of Environmental Economics and Management*, 5 1978, Nr. 4, 313–332

Hartley, Nicola/Wood, Christopher: Public Participation in environmental impact assessment-implementing the Aarhus Convention. *Environmental Impact Assessment Review*, 25 2005, 319–340

Hayek, F.A.: Individualism and Economic Order. University of Chicago, 1948

Hayek, F.A.: The Constitution of Liberty. University of Chicago Press, 1978

Hayward, Tim: Constitutional Environmental Rights. Oxford University Press, 2005

Health and Human Services/National Cancer Institute: Health status objectives. *Cancer*, 16 1991, Nr. 1, 416–440

Hedermann-Robinson, Martin: Article 228(2) EC and the Enforcement of EC Environmental Law: A Case of Environmental Justice Delayed and Denied? An analysis of Recent Legal Developments. *European environmental law reivew*, 15 2006, 312–342

Helfand, Gloria E./Peyton, L James: A Conceptual Model of Environmental Justice. *Social Science Quarterly*, 80 March 1999, Nr. 1, 68–83

Hertel, Shareen/Minkler, Lanse; Hertel, Shareen/Minkler, Lanse, editors: Chap. Economic Rights: The Terrain In Economic Rights: Conceptual, Measurement and Policy Issues. Cambridge, 2007, 1–36

Hertzman, C.: Environment and Health in Central and Eastern Europea. World Bank, 1995

Higgins, Rosalyn A.: Babel of Judicial Voices. *Int'l & Comp. L.Q.* 55 2006, 791–804

Hill, Barry E.: Lemons Into Lemonade. *Envtl. F.* 5 2002, 32

Hill, Barry E.: Environmental Justice: Legal Theory and Practice. Environmental Law Institute Press, 2009

Hill, Barry E/Wolfson, Steve/Targ, Nicholas: Human Rights and the Environment: A synopsis and some predictions. *Geo. Int'l. Envtl. L. Rev.* 16 2003-2004, 359–402

Hirsch, Fred: The Social Limits to Growth. Routledge, 1976

Hiskes, Richard P.: The Human Right to a Green Future: Environmental Rights and Intergenerational Justice. Cambridge University Press, 2009

Hoffer, Melissa A.: Closing the Door on Private Enforcement of Title VI and EPA's Discriminatory Effects Regulations: Strategies for Environmental Justice Stakeholders After Sandoval and Gonzago. *New Eng. L. Rev.* 38 2004, 971–1008

Hoidal, Sten-Erik: Returning to the Roots of Environmental Justice: Lessons from the Inequitable Distribution of Municipal Services. *Minn. L. Rev.* 88 2004, 193–221

Hökby, Stina/Söderqvist, Tore: Elasticities of Demand and Willingness to Pay for Environmental Services in Sweden. *Environmental and Resource Economics*, 26 2003, 361–383

Holifield, Ryan/Porter, Michael/Walker, Gordon: Introduction: Spaces of Environmental Justice: Frameworks for Critical Engagement. *Antipode*, 41 2009, Nr. 4, 591–612

Holland, Breena: Environment and Capability: A New Normative Framework for Environmental Policy Analysis. Ph. D thesis, The University of Chicago, 2005

Holland, Breena: Justice and the Environment in Nussbaum's "capabilities approach": Why sustainable ecological capacity is a meta-capability. *Political Research Quarterly*, 61 2008, 319–332

Holmes, Stephen/Sunstein, Cass: The Cost of Rights. W.W. Norton & Company, 1999

Hornborg, Alf/McNeill, J. R./Martinez-Alier, Joan, editors: Rethinking Environmental History. AltaMira Press, 2007

Hornstein, Donald: Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis. *Colum. L. Rev.* 92 1992, 562–633

Horton, John/Newey, Glen, editors: The Political Theory of John Gray. Routledge, 2007

Hotelling, Harold: Stability in Competition. *The Economic Journal*, 39 Mar 1929, Nr. 153, 41–57

Hughes, J Donald; Hornborg, Alf/McNeill, J. R./Martinez-Alier, Joan, editors: Chap. Environmental Impacts of the Roman Economy and Social Structure: Augustus to Diocletian In Rethinking Environmental History. AltaMira Press, 2007, 27–40

Huitema, Dave: Hazardous Decisions: Hazardous Waste Siting in the UK, The Netherlands, and Canada. Institutions and Discussions. Dordrecht: Kluwer Academic Publishers, 2002

Huriot, Jean-Marie/Thisse, Jacques-Fran cois, editors: Economics of Cities. Cambridge, 2000

Huriot, Jean-Marie/Thisse, Jacques-François; Huriot, Jean-Marie/Thisse, Jacques-François, editors: Chap. Introduction In The Economics of Cities. Cambridge, 2000, ix–xv

Hyam, Jeremy: Hatton v United Kingdom in the Grand Chamber: One Step Forward, Two Steps Back? *European Human Rights Law Review*, 6 2006, 631–640

Jaffe, Seth D.: The Market's Response to Environmental Inequity: We have the solution; what's the problem? *Virginia Environmental Law Journal*, 14 1995, 655–664

Janis, Mark W./Kay, Richard S./Bradley, Anthony W.: European Human Rights Law. 3rd edition. Oxford University Press, 2008

Jarre, Jan: Umweltbelastungen und ihre Verteilung auf soziale Schichten. Otto Schwarz & Co, 1975

Jencks, Christopher: Does Inequality Matter? *Daedalus*, 131 2002, Nr. 1, 49–65

Jerrett, M: A GIS-environmental justice analysis of particulate air-pollution in Hamilton, Canada. *Environment and Planning A*, 33 1996, 955–973

Johnson, Stephen M.: Economics v. Equity II: The European Experience. *Washington & Lee Law Review*, 58 2001, 417–486

Johnston, Craig N./Funk, William F./Flatt, Victor B.: Legal Protection of the Environment. Thomson West, 2005

Jolls, Christine/Sunstein, Cass R.: Debiasing through Law. National Bureau of Economic Research, Inc, November 2005 (11738). – NBER Working Papers, available at http://ideas.repec.org/p/nbr/nberwo/11738.html

Karlan, Pamela S.: Loving Lawrence. *Mich. L. Rev.* 102 2004, 1447–1463

Katz, Lawrence F./Kling, Jeffrey R./Liebman, Jeffrey B.: Moving To Opportunity In Boston: Early Results Of A Randomized Mobility Experiment. *The Quarterly Journal of Economics*, 116 May 2001, Nr. 2, 607–654

Keller, Bill: Soviet Scraps a New Atomic Plant in Face of Protest Over Chernobyl. *New York Times* January, 28 1988

Kendall, P.R.W.; Public Health, Department of, editor: Determining the Human Health Risks of Environmental Chemicals. Toronto: Environmental Protection Office, 1991

Kiel, Katherine: Environmental Contamination and House Values. College of the Holy Cross, Department of Economics, January 2006 (0601). – Technical report

Kiel, Katherine/Williams, Michael: An Analysis of the Impact of Multiple Environmental Goods on House Prices. College of the Holy Cross, Department of Economics, March 2005 (0505). – Technical report

Kiel, Katherine/Zabel, Jeffrey: Estimating the Economic Benefits of Cleaning Up Superfund Sites: The Case of Woburn, Massachusetts. *The Journal of Real Estate Finance and Economics*, 22 March-May 2001, Nr. 2-3, 163–84

Kiel, Katherine A.: The Impact of House Price Appreciation on Household Mobility. *Journal of Housing Economics*, 3 June 1994, Nr. 2, 92–108

Kiel, Katherine A./McClain, Katherine T.: House Prices during Siting Decision Stages: The Case of an Incinerator from Rumor through Operation. *Journal of Environmental Economics and Management*, 28 March 1995, Nr. 2, 241–255

Kiel, Katherine A/McClain, Katherine T: House Price Recovery and Stigma after a Failed Siting. *Applied Economics*, 28 November 1996, Nr. 11, 1351–58

Kiel, Katherine A./Williams, Michael: The impact of Superfund sites on local property values: Are all sites the same? *Journal of Urban Economics*, 61 January 2007, Nr. 1, 170–192

Kiel, Katherine A./Zabel, Jeffrey E.: House Price Differentials in U.S. Cities: Household and Neighborhood Racial Effects. *Journal of Housing Economics*, 5 June 1996, Nr. 2, 143–165

Klein, Naomi: The Shock Doctrine: The Rise of Disaster Capitalism. Picador, 2008

Kloepfer, Micheal: Umweltgerechtigkeit. Environmental Justice in der deutschen Rechtsordnung. 1st edition. Duncker & Humblot, 2006

Köckler, Heike: Coping Strategies of Households Exposed to Unequal Environmental Quality in Germany. In Paper for the 4th Global Conference Environmental Justice and Global Citizenship: Environments, Sustainability and Technology. Oxford, July 2005, 1–11

Koh, Harold Hongju; Ignatieff, Michael, editor: Chap. America's Jeckyll-and-Hyde Exceptionalism In American Exceptionalism and Human Rights. Princeton University Press, 2005, 111–143

Kohlhase, Janet Esty, Daniel C.: The impact of toxic waste sites on housing values. *Journal of Urban Economics*, 30 July 1991, Nr. 1, 1–26

Kohlhuber, Martina: Social inequality in perceived environmental exposures in relation to housing conditions in Germany. *Environmental Research*, 101 2006, 246–255

Kotzeva, Anna: Towards environmental accountability. *New Law Journal*, 155.7184 2005, 1036–37

Kravchecnko, Svitlana: The Myth of Public Participation in a World of Poverty. *Tulane Environmental Law Journal*, 33 2009, 33–56

Kravchenko, Svitlana/Bonnie, John E: Human Rights and The Environment: Cases, Law, and Policy. Carolina Academic Press, 2008

Krieg, Eric J: A Socio-Historical Interpretation of Toxic Waste Sites: The Case of Greater Boston. *American Journal of Economics and Sociology*, 54 1995, Nr. 1, 1–14

Krieg, Eric J.: The Two Faces of Toxic Waste: Trens in the Spread of Environmental Hazards. *Sociological Forum*, 13 1998, 3–20

Krier, James E.: The Pollution Problem and Legal Institutions: A Conceptual Overview. *UCLA L. Rev.* 18 1971, 429–477

Krugman, Paul: Increasing returns and economic geography. *Journal of Political Economy*, 99 1991, 482–499

Kruize, Hanneke: On environmental equity: exploring the distribution of environmental quality among socio-economic categories in the Netherlands. Ph. D thesis, Universiteit Utrecht, 2007

Kruize, Hanneke/Bouwman, Arno: The Distribution of Benefits and Costs of Environmental Policies: A Case Study on the Distribution of Environmental Impacts in the Rijnmond Region, the Netherlands. Utrecht, 2003 – Technical report

Kruvant, William: Chap. People, Energy, and Pollution In The American Energy Consumer. The Ford Foundation, 1975, 125–167

Ksentini, Fatma Zohra: Human Rights and the Environment. UN Commission on Human Rights; Sub-commission on Prevention of Discrimination and Protection of Minorities, 6 July 1994 (UN Doc E/CN.4/Sub.2/1994/9). – Technical report

Kuckartz, Udo/Rheingans-Hans, Anke: Trends im Umweltbewusstsein. VS Verlag, 2006

Kuehn, Robert R.: A Taxonomy of Environmental Justice. *Environmental Law Reporter*, 30 2000, 1068110703

Kunst, Anoton E.: Trends in socioeconomic inequalities in self-assessed health in 10 European countries. *International Journal of Epidemiology*, 34 2005, 295–305

La Londe, Kyle W.: Who Wants to Be an Environmental Justice Advocate: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander v. Sandoval. *B.C. Envtl. L. Rev.* 31 2004, 27–60

Lambert, Thomas/Boerner, Christopher: Environmental Inequity: Economic Causes, Economic Solutions. *Yale Journal on Regulation*, 14 1997, 195–234

Lambert, Thomas A.: The Case Against Private Disparate Impact Suits. *Ga. L. Rev.* 34 2000, 1155–1252

Laufer, John Arthur: Alexander v. Sandoval and Its Implications for Disparate Impact Regimes. *Colum. L. Rev.* 102 2002, 1613–1658

Laurian, Lucie: Environmental injustice in France. *Journal of Environmental Planning and Management*, 51 2008, 55–79

Lavelle, M./Coyle, M.: Unequal Protection: The racial divide in environmental law. *The National Law Journal*, 21 1992, S2–S12

Lawrence III, Charles: Unconscious Racism Revisited: Reflections on the Impact and Origins of the Id, the Ego, and Equal Protection. *Conn. L. Rev.* 40 2008, 931–978

Lawrence III, Charles R.: The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism. *Stanford Law Review*, 39 1987, 317–388

Lazarus, Richard/Tai, Stephanie: Integrating Environmental Justice into EPA permitting authority. *Ecology L.Q.* 26 1999, 617–678

Lazarus, Richard J.: Pursuing "Environmental Justice": The distributional effects of environmental protection. *Northwestern University Law Review*, 87 1993, Nr. 3, 787–856

Lazarus, Richard J.: The Greening of American and the Greying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States. *Va. Envtl. L.J.* 20 2001, 75–106

Leroy, Pieter/Nelissen, Nico: Social and Political Sciences of the Environment: Three decades of research in the Netherlands. International Books, 1999

Letschert, Rianne M.: The Impact of Minority Rights Mechanisms. T.M.C. Asser, 2005

Levins, Richard; Hofrichter, Richard, editor: Chap. Is Capitalism a Disease? In Health and Social Justice. John Wiley and Sons, 2003, 365–384

Lewis, Browne C.: Changing the Bathwater and Keeping the Baby: Exploring New Ways of Evaluating Intent in Environmental Discrimination Cases. *St. Louis U. L.J.* 50 2006, 469–516

Lewontin, Richard C.: Biology as Ideology: The Doctrine of DNA. Harper Perennial, 1993

Lichtenstein, Paul: Environmental and heritable factors in the causation of cancer. *New England Journal of Medicine*, 343 2002, Nr. 2, 78–85

Liu, Feng: Environmental Justice Analysis: Theories, Methods, and Practice. Lewis Publishers, 2001

Lloyd-Smith, M E/Bell, L: Toxic disputes and the rise of environmental justice in Australia. *International Journal of Occupational Health*, 9 2003, 14–23

Lye, Linda: Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense. *Berkeley J. Empl. & Lab. L.* 19 1998, 315–361

Maantay, J/Maroka, A/Hermann, C: Mapping population distribution in the urban environment: The cadastral-based expert daysmetric system (CEDS). *Cartography and Geographic Information Systems*, 34 2007, 77–102

Maclachlan, John C.: Mapping health on the internet: A new tool for environmental justice and public health research. *Health and Place*, 13 2007, 72–86

Madden, Peter: Escape from pollutionville. *The Guardian*, Society January 14 2004, 13–14

Mahoney, Paul: Judicial activism and judicial self-restraint in the European Court of Human Rights: two sides of the same coin. *Human Rights Law Journal*, 11 1990, Nr. 1-2, 57–88

Mank, Bradford C.; Gerrard, Michael B., editor: Chap. Executive Order 12,989 In The Law of Environmental Justice. American Bar Association, 1999, 103–139

Mank, Bradford C.; Gerrard, Michael B., editor: Chap. Title VI In The Law of Environmental Justice. American Bar Association, 1999, 23–68

Mank, Bradford C.: Suing under 1983: The Future after Gonzaga University v. Doe. *Hous. L. Rev*, 39 2003, 1417–82

Mank, Bradford C.: Can Administrative Regulations Interpret Rights Enforceable under Section 1983: Why Chevron Deference Survives Sandoval and Gonzaga. *Fla. St. U. L.* 32 2005, 843–896

Martinez-Alier, J: Scale, environmental justice, and unsustainable cities. *Capitalism, Nature, Socialism*, 14 2003, Nr. 1, 43–63

Martinez-Alier, Joan: The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation. Edward Elgar, 2002

Maschewsky, Werner: Umweltgerechtigkeit-Gesundheitsrelevenz und empirische Erfassung. Hamburg, 2004 – Technical report

McCarthy, D: Environmental Justice grantmaking: Elites and activists collaborate to transform philanthropy. *Sociological Inquiry*, 74 2004, Nr. 2, 250–270

McCaull, Julian: Discriminatory Air Pollution: If The Poor Don't Breathe. *Environment*, 18 March 1976, 26–32

McColgon, Aileen: Cracking the Comparator Problem: Discrimination, "Equal" treatment and the role of comparisons. *European Human Rights Law Review*, 6 2006, 650–677

McCorquodale, Robert/Fairbrother, Richard: Globalization and Human Rights. *Human Rights Quarterly*, 21 1999, 735–766

McDermott, Charles J.: Environmental Equity: A Waste Manager's Perspective. *Land Use Forum*, 2 Winter 1993, Nr. 1, 12–17

McDermott, Charles J: Balancing the Scales of Environmental Justice. *Fordham Urb. L.J.* 21 1994, 689–707

McDonald, David A.: Environmental Justice in South Africa. Ohio University Press, 2002

McGinnis, J. Michael; Samet, Jonathan A./McGinnis, J Michael/ Soto, Michael A., editors: Chap. Attributable Risk in Practice In Estimating the contributions of lifestyle-related factors to preventable death. Washington, DC: Institute of Medicine, National Academy Press, 2005, 17–32

Meiners, Roger/Yandle, Bruce: Common Law and the Conceit of Modern Environmental Policy. *Geo. Mason. L. Rev.* 7 1999, 923–963

Meiners, Roger E./Yandle, Bruce: Common law environmentalism. *Public Choice*, 94 1998, 49–66

Mennis, Jeremy: Using Geographical Information Systems to Create and Analyze Statistical Surfaces of Populations and Risk for Environmental Justice Analysis. *Social Science Quarterly*, 83 March 2002, Nr. 1, 281–297

Mennis, Jeremy L.: The Distribution of Enforcement of Air Polluting Facilities in New Jersey. *The Professional Geographer*, 57 August 2005, Nr. 3, 411–422

Middelkoop, M van/Bruls, E J/Golen, A J van: Rood en groen in balans: verkenning van groene normen en alternatieve benaderingen. Foundation on Recreation, Knowledge and Innovation Centre, 2001

Miller, David: Distributing Responsibilities. *Journal of Political Philsophy*, 9 December 2001, Nr. 4, 453–471

Mitchell, Gordon/Dorling, Danny: An environmental justice analysis of British air quality. *Environment and Planning A*, 35 May 2003, Nr. 5, 909–929

Mohai, Paul/Bryant, Bunyan: Environmental Justice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards. *U. Colo. L. Rev.* 63 1992, 921–932

Monmonier, Mark: Zip Codes, Data Compatibility, and Environmental Racism. *GIS Law*, 2 1994, 4–5

Moreau, Sophia Reibetanz: Equality Rights and the Relevance of Comparator Groups. *J.L. & Equality*, 5 2006, 81–96

Morriss, Andrew P./Yandle, Bruce/Dorchak, Andrew: Choosing How to Regulate. *Harv. Envtl. L. Rev.* 29 2005, 179–250

Mowbray, Alastair: The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights. Hart Publishing, 2004

Myrdal, Janken; Hornborg, Alf/McNeill, John Robert/Alier, Juan Martnez, editors: Chap. Food, War, and Crisis: The Seventeenth-Century Swedish Empire In Rethinking Environmental History. AltaMira Press, 2007, 79–100

Nelson, Jon P.: Residential choice, hedonic prices, and the demand for urban air quality. *Journal of Urban Economics*, 5 July 1978, Nr. 3, 357–369

Newman, Dorothy K./Day, Dawn: The American Energy Consumer: A Report to the Energy Policy Project of the Ford Foundation. The Ford Foundation, 1975

Nickel, James: Making Sense of Human Rights. 2nd edition. Wiley-Blackwell, 2007

Nito, Hajime; Husimi, Kodi, editor: Chap. A Legal Right to the Environment In Science for Better Environment Fundamental Rights and Environmental Quality: Proceedings of the International Congress on the Human Environmental. Pergamon Press, 1977, 727–732

Noonan, Douglas S.: Evidence of Environmental Justice: A Critical Perspective on the Practice of EJ Research and Lessons for Policy Design. *Social Science Quarterly*, 89 2008, 1153–1174

Note: After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement. *Harv. L. Rev.* 116 2003, 1774–1797

Nozick, Robert: Anarchy, State, and Utopia. Basic Books, 1974

Nussbaum, Martha: Frontiers of Justice: disability, nationality, species membership. Belknap Press, 2006

Nussbaum, Martha/Sen, Amartya: The Quality of Life. Oxford University Press, 1993

Oakes, John Michael/Anderton, Douglas L./Anderson, Andy B.: A Longitudinal Analysis of Environmental Equity in Communities with Hazardous Waste Facilities. *Social Science Research*, 25 1998, Nr. 2, 125–148

Oemrawsingh, Sangini Tilottama: Human Rights and the Environment Interlocked: Dealing with Environmental Problems in a Human Rights Setting. Ph. D thesis, Universiteit van Amsterdam, 2008

Okun, Arthur M.: Equality and Efficiency: The Big Tradeoff. The Brookings Institution, 1975

Olson, Mancur: The Rise and Decline of Nations: Economic Growth, Stagflation and Social Rigidities. New Haven/London: Yale University Press, 1982

Olson, Mancur: Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships. Basic Books, 2000

O'Neil, Sandra George: Environmental Justice in the superfund clean-up process. Ph. D thesis, Boston College, 2005

Oppenheimer, David Benjamin: Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Verdicts Reveals Low Success Rates for Women and Minorities. *U.C. Davis. L. Rev.* 37 2004, 511–566

Osiatyński, Wiktor: Human Rights and Their Limits. Cambridge University Press, 2009

Osofsky, Hari M.: Learning from Environmental Justice: A New Model for International Environmental Rights. *Stan. Envtl. L. J.* 24 2005, 71–147

Ottigner, Gwen Ellen: Grounds for action: Community and science in environmental justice controversy. Ph. D thesis, University of California, Berkeley, 2005

Ovey, Clare/White, Robin: The European Convention on Human Rights. 4th edition. Oxford University Press, 2006

Paehlke, Robert C.: Democracy's Dilemma: Environment, Social Equity, and the Global Economy. MIT Press, 2004

Pallemaerts, Marc; Déjeant-Pons, Maguielonne, editor: Chap. Introduction: human rights and environmental protection In Human rights and the environment. Council of Europe Publishing, 2002, 11–24

Park, Robert E./Burgess, Ernest W./Janowitz, Morris: The City: Suggestions for Investigation of Human Behavior in the Urban Environment. University of Chicago Press, 1984 (1925)

Pearce, J/Kingham, S/Zawar-Reza, P: Every breath you take? Environmental justice and air pollution in Christchurch, New Zealand. *Environmental and Planning A*, 38 2005, Nr. 5, 919–938

Pellow, David Naguib: Resisting Global Toxics. The MIT Press, 2007

Perrolle, Judith A.: Comments from the Special Edition Editor: The Emerging Dialogue on Environmental Justice. *Social Problems*, 40 February 1993, Nr. 1 Special Edition, 1–4

Pinker, Steven: The Blank Slate: The Modern Denial of Human Nature. Penguin, 2003

Piven, Frances Fox/Cloward, Richard A.: Poor People's Movements: Why They Succeed, How They Fail. Pantheon Books, 1977

Polyani, Karl: The Great Transformation. 2nd edition. Beacon Press, 2001

Porter, Rob: Environmental Justice and North Georgia Wilderness: A GIS based Analysis. VDM Verlag, 2009

Portney, Paul R: The Contingent Valuation Debate: Why Economists Should Care. *Journal of Economic Perspectives*, 8 Fall 1994, Nr. 4, 3–17

Primus, Richard A.: Equal Protection and Disparate Impact: Round Three. *Harvard Law Review*, 117 2003, Nr. 2, 493–587

Proctor, Robert N: The anti-tobacco campaign of the Nazis: a little known aspect of public health in Germany, 1933-45. *British Medical Journal (BMJ)*, 313 Dec 7 1996, 1450–1453

Przeworski, Adam: The Neoliberal Fallacy. *Journal of Democracy*, 3 1992, 45–59

Puga, Diego: European regional policies in light of recent location theories. *Journal of Economic Geography*, 2 2002, 373–406

Rajotte, Benjamin: Environmental Justice in New Orleans: A New Lease on Life for Title VIII. *Tulane Environmental Law Journal*, 21 2008, 51–82

Rajotte, Benjamin: A Housing-centred approach to Justice. *J. Envtl L. & Litig*, 24 2009, 165–180

Rakoff, Todd: Washington v. Davis and the Objective Theory of Contracts. *Harv. C.R.-C.L. L. Rev.* 29 1994, 63–99

Ratner, Steven R.: Corporations and Human Rights: A Theory of Legal Responsibility. *Yale L. J.* 111 2001, 443–554

Rawls, John: A Theory of Justice (Original Edition). Belknap Press, 2005

Revesz, Richard L.: Federalism and Environmental Regulation: A Public Choice Analysis. *Harv. L. Rev.* 115 2002, 553–641

Ridker, Ronald G./Henning, John A.: The Determinants of Residential Property Values with Special Reference to Air Pollution. *The Review of Economics and Statistics*, 49 May 1967, Nr. 2, 246–257

Ringquist, Evan J: Assessing Evidence of Environmental Inequities: A Meta-Analysis. *Journal of Policy Analysis and Management*, 24 2005, 223–247

Risse, Mathias: De We Owe the Poor Assistance or Rectification? *Ethics and International Affairs*, 19 2005, Nr. 1, 9–18

Risse, Mathias: How Does the Global Order Harm the Poor? *Philosophy and Public Affairs*, 33 September 2005, Nr. 4, 349–376

Risse, Mattias: A Right to Work? A Right to Leisure? Labor Rights as Human Rights. *Law & Ethics of Human Rights*, 3 2009, Nr. 1, 1–39

RIVM: Milieubalans 2001-Het Nederlandse milieu verklaard. Kluwer, Alphen a/d Rijn, 2001 – Technical report

Rogers, Richard J.: New York City's Fair Share Criteria and the Courts: An Attempt to Equitably Redistribute the Benefits and Burdens Associated with Municipal Facilities. *N.Y.L. Sch. J. Hum. Rts.* 12 1995, 193–242

Romer, Paul: Increaseing returns and long-run growth. *Journal of Political Economy*, 94 1986, 1002–1037

Roorda, J/van Stiphout, W.A.H.J/Huijsman-Rubingh, R.R.R: Post-disaster health effects: strategies for investigation and data collection. Experiences from the Enschede firework disaster. *Journal of Epidemiology and Community Health*, 58 2004, 982–987

Rose, G: Sick individuals and sick populations. *International Journal of Epidemiology*, 14 1985, 32–38

Rose, G: The strategy of preventive medicine. Oxford University Press, 1992

Rose-Ackerman, Susan: Controlling Environmental Policy: The Limits of public law in Germany and the United States. Yale University Press, 1995

Rosen, Sherwin: Hedonic Prices and Implicit Markets: Product Differentiation in Pure Competition. *The Journal of Political Economy*, 82 January 1974, Nr. 1, 34–55

Rosenthall, John: Supplemental Projects as Tools for Environmental Justice and Economic Development in Small Towns. Human Rights Magazine, Spring 2004 (30).– Technical report, available at http://www.abanet.org/irr/hr/fall03/tools.html

Ruhl, J B: The Seven Degrees of Relevance: Why Should Real-World Environmental Attorneys Care Now About Sustainable Development Policy? *Duke Envtl. L. & Pol'Y F.* 8 1998, 273–294

San José, Daniel Garcia: Environmental protection and the European Convention on Human Rights. Council of Europe Publishing, 2005

Save Our Valley v. Sound Transit: Recent Cases: Federal Courts—Civil Rights Litigation—Ninth Circuit Holds That An Administrative Regulation Can Never Create an Individual Federal Right Enforceable Through §1983—Save Our Valley v. Sound Transit, 335 F.3d 932 (9th Cir. 2003). 117 Harv. L. Rev. 735, 2004

Saward, Michael: The Terms of Democracy. Cambridge University Press, 1998

Scandrett, Eurig: Community Work, Sustainable Development and Environmental Justice. *Scottish Journal of Commnity Work and Development*, 6 2000, 1

Schlosberg, David: Defining Environmental Justice: Theories, Movements, and Nature. New York: Oxford University Press, 2007

Schmalensee, Richard, et al: An Interim Evaluation of Sulfur Dioxide Emissions Trading. *Journal of Economic Perspectives*, 12 Summer 1998, Nr. 3, 53–68

Schrader-Frechette, Kristin: Human Rights and Duties to Alleviate Environmental Injustice: The Domestic Case. *Journal of Human Rights*, 6 2007, 107–130

Schwartz, Bernard/Corrada, Roberto/Brown Jr, J. Robert: Administrative Law: A Casebook. Aspen Publishers, 2006

Schweitzer, Lisa: Environmental Sacrifice Zones: Risk and Transport in Southern California. Ph. D thesis, University of California, Los Angeles, 2004

Schweitzer, Lisa/Stephenson Jr., Max: Right Answers, Wrong Questions: Environmental Justice. *Urban Studies*, 44 February 2007, Nr. 2, 319–337

Scott, Dayna Nadine: The Mutual Constitution of Risk and Precaution. Ph. D thesis, York University, 2005

Seicshnaydre, Stacy E: Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on a State of Mind in Antidiscrimination Law. *Wake Forest Law Review*, 42 2007, 1141–1200

Seiner, Joseph A.: Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach. *Yale L. & Pol'y Rev.* 25 2007, 95–142

Sen, Amartya: Inequality Reexamined. Harvard University Press, 2004

Serret, Yse/Johnstone, Nick, editors: The Distributional Effects of Environmental Policy. Edward Elgar Publishing, 2006

Sheldon, Ian: Trade and Environmental Policy: A Race to the Bottom? *Journal of Agricultural Economics*, 57 2006, Nr. 3, 365–392

Shelton, Dinah: Human Rights, Environmental Rights, and the Right to Environment. *Stanford Journal of International Law*, 28 1991, 103

Shue, Henry: Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy. 2nd edition. Princeton: Princeton University Press, 1996

Shultz, Steven D./King, David A.: The Use of Census Data for Hedonic Price Estimates of Open-Space Amenities and Land Use. *The Journal of Real Estate Finance and Economics*, 22 2001, Nr. 2-3, 239–252

Simons, Robert A./Saginor, Jesse D.: A Meta-Analysis of the Effect of Environmental Contamination and Positive Amenities on Residential Real Estate Values. *Journal of Real Estate Research*, 28 2006, Nr. 1, 71–104

Sinden, Amy: Climate Change and Human Rights. *Journal of Land Resources and Environmental Law*, 27 2007, 255–272

Singh, Ajit: Labour Standards and the 'Race to the Bottom': Rethinking Globalization and Workers' Rights from Developmental and Solidaristic Perspectives. *Oxford Review of Economic Policy*, 20 Spring 2004, Nr. 1, 85–104

Smith, V. Kerry/Huang, Ju-Chin: Hedonic models and air pollution: Twenty-five years and counting. *Environmental and Resource Economics*, 3 1993, 381–394

Smith, V Kerry/Huang, Ju-Chin: Can Markets Value Air Quality? A Meta-analysis of Hedonic Property Value Models. *Journal of Political Economy*, 103 February 1995, Nr. 1, 209–27

Spyke, Nancy Perkins: Public Participation in Environmental Decisionmaking at the New Millennium: Structuring new Spheres of Public Influence. *B.C. Envtl. Aff. L. Rev.* 26 1999, 263–313

Steiner, Henry J./Alston, Philip: International Human Rights In Context. 2nd edition. Oxford University Press, 2000

Stigler, George: The Theory of Economic Regulation. *Bell Journal of Economics and Management Science*, 3 1971, 3–18

Stone, Christopher D.: Should Trees Have Standing—Toward Legal Rights for Natural Objects. *S. Cal. L. Rev.* 45 1972, 450–501

Strange, Susan: The Retreat of the State. Cambridge University Press, 1996

Strohm, L. A.: Pollution Havens and the Transfer of Environmental Risk. *Global Environmental Politics*, 2 2002, 29–36

Sullivan, Charles A.: Disparate Impact: Looking Past the *Desert Palace* Mirage. *Wm. & Mary L. Rev.* 47 2006, 911–1002

Sullivan, Charles A.: The Phoenix from the *Ash*: Proving Discrimination by Comparators. *Alabama Law Review*, 60 2009, 191–239

Sunstein, Cass: Risk and Reason: Safety, Law, and the Environment. Cambridge University Press, 2004

Sunstein, Cass R.: Free Markets and Social Justice. Oxford University Press, 1997

Sunstein, Cass R.: What did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage. *Supreme Court Review*, 2003 2003, 27–74

Sunstein, Cass R.; Ignatieff, Michael, editor: Chap. Why Does the American Constitution Lack Social and Economic Guarantees? In American Exceptionalism and Human Rights. Princeton University Press, 2005, 90–110

Szasz, Andrew: EcoPopulism: Toxic Waste and the Movement for Environmental Justice. University of Minnesota Press, 1994

Sze, J/London, J K: Environmental Justice at the Crossroads. *Sociology Compass*, 2 2008, 1331–1354

Sze, Julie: Noxious New York. MIT Press, 2007

Taliman, V: Toxic Waste dumping in the Third World. *Race and Class*, 30 1989, 47–56

Taquino, Michael/Parisi, Domenico/Gill., Duane A.: Units of Analysis and the Environmental Justice Hypothesis: The Case of Industrial Hog Farms. *Soc. Sci. Q.* 83 2002, 298–316

Taylor, D. E.: Blacks and the environment: Toward an explanation of the concern and action gap between blacks and whites. *Environment and Behavior*, 21 1989, 175–2005

Tellegen, Egbert/Wolsink, Maarten: Milieu en samenleving: een sociologische inleiding. Leiden, 1992

Thorsheim, Peter: Inventing Pollution: Coal, Smoke, and Culture in Britain since 1800. Ohio University Press, 2006

Todd, Helen/Zografos, Christos: Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland. *Environmental Values*, 14 November 2005, Nr. 4, 483–501

Torres, Gerald: Race, Class, and Environmental Regulation. *University of Colorado Law Review*, 63 1992, Nr. 4, 839–848

Tripp, James T.B./Alley, Nathan G.: Streamlining NEPA's Environemental Review Process: Suggestions for Agency Reform. *N.Y.U. Envtl. L.J.* 12 2005, 74–110

Trouwborst, Arie: Evolution and Status of the Precautionary Principle in International Law. Kluwer Law International, 2002

Turner, Stephen J.: A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers Toward the Environment. Kluwer, 2009

Tyson, Frederick L.: Cancer, the environment, and environmental justice. *Cancer*, 83 October 1998, Nr. 8 Supplement, 1784–1792

United Church of Christ: Toxic Waste and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites. New York, 1987 – Technical report

United States General Accounting Office: Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities. Washington, D.C., June 1 1983 – Technical report

Ursic, Joseph: Finding a Remedy for Environmental Justice: Using 42 U.S.C. 1983 to Fill in a Title VI Gap. *Case W. Res. L. Rev.* 53 2003, 497–530

U.S. EPA: Reducting Risk for All Communities, Vol. 1: Workgroup Report to the Administrator. Washington, D.C., 1992 – Technical report

van Lanen, J.J.M.: Mensenrechten en milieubescherming: van een wankel evenwicht naar een sterk samenspel. *Nederlands Juristen Comité voor de Mensenrechten (NJCM)*, 24 Dec 1999, Nr. 8, 1038–1057

Varga, Csaba/Kiss, István/Ember, István: The Lack of Environmental Justice in Central and Eastern Europe. *Environmental Health Perspectives*, 110 November 2002, Nr. 11, A662–A663

Veblen, Thorstein: The Theory of the Leisure Class. Modern Library Paperback Edition edition. Random House, 1899 (2001)

Vera, Esther Pozo/Masson, Nathy-Rass/Krämer, Ludwig: Milieu-Environmental Law and Policy. European Union Environment Directorate General, September 2007 (Study Contract 07-010401/2006/450607/MAR/A1). – Technical report

Verschuuren, Jonathan/Kuchta, Steve; Letschert, Rianne/van Dijk, Jan, editors: Chap. Victims of Environmental Pollution in the Slipstream of Globalization In The New Faces of Victimhood: Globalization, Global Justice and Victim Empowerment. Springer, 2010, Forthcoming

Walda, I: Bestaat er een verband tussen sociaal-economische status en blootstelling aan omgevingslawaai? *Geluid*, 2 2002, 57–60

Waldron, Jeremy: A Rights-Based Critique of Constitutional Rights. *Oxford Journal of Legal Studies*, 13 1993, 18–51

Walker, Gordon: Beyond Distribution and Proximity: Exploring the Multiple Spatialities of Environmental Justice. *Antipode*, 41 2009, Nr. 4, 614–636

Walker, Gordon/Bulkeley, Harriet: Geographies of environmental justice. *GeoForum*, 37 2006, 655–659

Wasserstrom: Racism, Sexism, and Preferential Treatment: An Approach to the Topics. *UCLA L. Rev.* 24 1977, 581

Weinberg, Philip; Gerrard, Michael B., editor: Chap. Equal Protection In The Law of Environmental Justice. American Bar Association, 1999, 3–20

Weinberg, Philip: Environmental Law. *Syracuse Law Review*, 55 2005, 965–980

Wennerås, Pål Erik: EC Environemental Law in National and Community Courts. Ph. D thesis, Universiteit van Amsterdam, 2006

Wenz, Peter S.: Environmental Justice. SUNY Press, 1988

Westen, Paul: The Empty Idea of Equality. *Harvard Law Review*, 95 1982, 547–551

White, Rebecca Hanner/Krieger, Linda Hamilton: Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making. *La. L. Rev.* 61 2001, 495–538

White, Rob: Crimes Against Nature. Willan Publishing, 2008

Wikler, Daniel: Personal Social Responsibility for Health. *Ethics and International Affairs*, 16 2002, 47–55

Wilkinson, Richard: Mind the Gap: Hierarchies, Health, and Human Evolution. New Haven: Yale University Press, 2000

Wilkinson, Richard D.: Unhealth Societies: The affliction of inequality. Routledge, 1996

Winant, Howard: The World is a Ghetto: Race and Democracy since World War II. New York: Basic Books, 2001

Wolpert, Julian: Regressive Siting of Public Facilities. *Natural Resources Journal*, 16 1976, 103–115

World Commission on Environment and Development, editor: Our Common Future. Oxford University Press, 1987

Worsham, Julia B. Latham: Disparate Impact Lawsuits Under Title VI, Section 602: Can A Legal Tool Build Environmental Justice? *B.C. Envtl. Aff. L. Rev*, 27 2000, 631–706

Wouters, Jan/Chanet, Leen: Corporate human rights responsibility: a european perspective. *Northwestern University Journal of International Human Rights*, 6 2008, 262–303

Yandle, Bruce: Common Sense and Common Law for the Environment. Rowman & Littlefield Publishers, Inc., 1997

Yang, Tseming: The Form and Substance of Environmental Justice: The Challenge of Title VI of the Civil Rights Act of 1964 for Environmental Regulation. *B.C. Envtl. Aff. L Rev.* 29 2002, 143–228

Zimmermann, Klaus: Umweltpolitik und Verteilung: eine Analyse der Verteilungswirkungen des öffentlichen Gutes Umwelt. E. Schmidt, 1985

Zimmermann, R.: Social equity and environmental risk. *Risk Analysis*, 13 1993, 649–666

Zupan, Jeffrey M.: The Distribution of Air Quality in the New York Region. Baltimore, MD: Johns Hopkins University Press, 1973

Index of U.S. Cases

260

INS v. Chadha, 462 U.S. 919 (1983), 241

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), 263

Jacobellis v. Ohio, 378 U.S. 184 (1964), 224

Laramore v. Illinois Sports Facilities Authority, 722 F. Supp. 433 (N.D. Ill. 1989), 259

Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984), 264

Lawrence v. Texas, 539 U.S. 558 (2002), 212

Loving v. Virginia, 388 U.S. 1 (1967), 207, 225

Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992), 104

Maine v. Thiboutot, 448 U.S. 1 (1979), 250

Marks v. United States, 430 U.S. 188, 193 (1977), 245

McCleskey v. Kemp, 481 U.S. 279 (1987), 229

McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973), 263

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), 264

Meyer v. Nebraska, 262 U.S. 390 (1923), 246

Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), 249

Miller v. City of Dallas, No.3 98-CV-2955-D, (US District Court, N.D. Texas 2002), 261

Mistretta v. United States, 488 U.S. 361 (1989), 254

Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978), 250

Monroe v. Pape, 365 U.S. 167 (1961), 221

Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973), 250

NAACP v. American Family Mutual Insurance Company, 978 F.2d 287 (1992), 261

NAACP v. Gorsuch, No. 82-768-CIV-5 (E.D.N.C. Aug. 10, 1982), 79

NAACP v. Medical Center Inc., 657 F.2d 1322(3rd Cir. 1981), 242

New York City Environmental Justice Alliance v. Giuliani, 50 F. Supp. 2d 250, (S.D.N.Y. 1999), 233

Nicholson v. Connecticut Half-Way House, 218 A.2d 383, 1966, 25

250

United States v. Carolene Products Co., 304 U. S. 144 (1938), 217, 226
United States v. Koch, 352 F. Supp. 2d 970 (D. Neb. 2004), 260
United States v. Mead Corp., 533 U.S. 218 (2001), 241
United States v. Morrison, 529 U.S. 598 (2000), 220
United States v. O'Hagan, 521 U.S. 642 (1997), 243
United States v. Scotland Neck City Board of Education, 407 U.S. 484 (1972), 69

Vance v. Bradley, 440 U.S. 93 (1979), 224
Village of Arlington Heights v. Metropolitan Housing Development Co., 429 U.S. 252 (1977), 72, 233
Villanueva v. Carere, 85 F.3d 481 (1996), 245

Warren Co. v. State of North Carolina 528 F. Supp. 276 (1981), 96
Warth v. Seldin, 422 U.S. 490 (1975), 227
Washington v. Davis, 426 U.S. 229 (1976), 228
Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976), 72
Wolff v. McDonnell, , 418 U.S. 539 (1974), 217
Wright et al. v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987), 249
Wright v. City of Roanoke, 479 U.S. 418 (1987), 252

Yick Wo v. Hopkins, 118 U.S. 356,(1886), 74, 223, 232

Index of ECHR Cases

Chassagnou v. France, application no. 25088/94, judgment of 29 April 1999, 178, 181

Costello-Roberts v. the United Kingdom, application no. 13134/87 judgment of 25 March 1993, 139

DH and Others v. Czech Republic, judgement of 6 February 2006, 180

Dudgeon v. United Kingdom, 15

Eğdąs v. Turkey, 27 July 2004, 158

Engel v. Netherlands, application no. 5100/71, judgment of 8 June 1976, 178

Fägerskiöld v. Sweden, application no. 37664/04, 26 February 2008, 164

Fadeyeva v. Russia, application no. 55723/00, judgment of 9 June 2005, 149, 155, 163–165, 187

Fredin v. Sweden (No. 1), application no. 12033/86, judgment of 18 February 1991, 156, 179

Fretté v. France, judgment of 26 Feb. 2002, 154, 180

Gaygusuz v. Austria, application no. 17371/90, judgment of 16 September 1996, 178

Giamcomelli v. Italy, application no. 59909/00, judgment of 2 November 2006, 161

Golder v. the United Kingdom, application no. 4451/70, 21 February 1975, 174, 176

Golder v. United Kingdom, judgment of 21 February 1975, Series A, No. 18., 148

Gorraiz Lizarraga and Others v. Spain, application no. 62543/00 judgment of 27 April 2004, 143

Gorriaz Lizarraga and Others v. Spain, application no. 62543/00, judgment of 10 November 2004, 189

Greek Case, 196 (1969), 145

Guerra and Others v. Italy, application no 116 /1996/735/932, Grand Chamber judgment of 19 February 1998, 148, 166–170

Guerra and Others v. Italy, application no. 116/1996/735/932, judgment of 19 February 1998, 155

Guerra v. Italy, application no. 116/1996/735 judgement of the Grand Chamber, 19 February 1998, 287

Hatton and Others v. United Kingdom, application no. 36022/97, Grand Chamber judgment of 8 July 2003, 61, 148, 155, 157–160, 175

Hentrich v. France, application no. 13616/88, judgment of 22 September 1994, 175

Moreno Gómez v. Spain, application no. 4143/02, judgment of 16 November 2004, 155, 189

Murray v. United Kingdom, application no. 14310/88, judgment of 28 Oct. 1994, 175

van der Mussele v. Belgium, application no. 8919/80, judgment of 23 November 1983, 179

National Union of Belgian Police v. Belgium, application no. 4464/70, judgement of 27 October 1975., 178

Niemietz v. Germany, application no. 13710/88, judgment of 16 December 1992, 154, 162

Okyay and others v. Turkey, application no. 36220/97, judgment of 10 December 2005, 204

Osman v. United Kingdom, application no. 23452/94, judgment of 28 October 1998, 150

Papastavrou and Others v. Greece, application no. 46372/99, judgment of 10 April 2003, 156

Paul and Audrey Edwards v. United Kingdom, application no. 46477/99, judgment of 14 March 2002, 150

Paulik v. Slovakia, judgement of 27 July 2004, 179

Pine Valley Developments Ltd. and Others v. Ireland, application no. 12741/87, judgment of 29 November 1991, 156

Powell & Rayner v. the United Kingdom, application no. 9310/81, judgment of 21 February 1990, 148, 154, 155, 157, 161, 175

Rees v. United Kingdom, Series A no. 106, judgment of 17 October 1986, 161

Refah Partisi v. Turkey, 35 E.H.R.R. 3, 15

Republic of Ireland v. United Kingdom, judgment of 18 January 1978, 2 E.H.R.R. 25, 146

Salmun v. Turkey, application no. 21986/93, judgment of 27 June 2000, 150

Sidbaris & Džlautas v. Lithuania, applications nos. 55480/00 and 59330/00 judgment of 27 July 2004, 179, 266

Silver and Others v. United Kingdom, application no. 5947/72, judgment of 25 March 1983, 175

General Index